

**California High-Speed Rail Authority**



**RFP No.: HSR13-57**

**Request for Proposals for Design-Build  
Services for Construction Packages 2 - 3**

**Reference Material, Part E.1 – Surface  
Transportation Board Decision**

SERVICE DATE – AUGUST 12, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35724 (Sub-No. 1)

CALIFORNIA HIGH-SPEED RAIL AUTHORITY  
—CONSTRUCTION EXEMPTION—  
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CAL.

Digest:<sup>1</sup> The California High-Speed Rail Authority is authorized to construct a 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal., subject to environmental mitigation conditions.

Decided: August 11, 2014

By petition filed on September 26, 2013, the California High-Speed Rail Authority (Authority), a state agency formed in 1996, seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authority to construct an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. (the Line). The Line would be the second section of the planned statewide California High-Speed Train System (HST System).

On December 4, 2013, the Board instituted a proceeding under 49 U.S.C. § 10502(b) and denied the Authority's request to conditionally grant the construction authority by addressing the transportation aspects of the proposed project before the environmental review was completed. Through a series of decisions, the Board extended the original October 16, 2013 deadline for comments on the transportation merits to March 7, 2014.

As discussed below, on August 23, 2013, the Board became a cooperating agency, as defined by 40 C.F.R. § 1508.5, for the preparation of a final project-specific Environmental Impact Statement (EIS) for the Line, as well as for the other EISs currently being prepared or in the planning stages for the remainder of the proposed HST System.<sup>2</sup> Subsequently, the Board's

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The regulations of the Council on Environmental Quality (CEQ) implementing the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA) encourage agencies with shared licensing authority over projects to reduce paperwork and duplication of effort by working together on environmental reviews. 40 C.F.R. § 1501. In such instances, cooperating agencies work together under the lead of one agency, and the EIS that results gives all agencies

(continued . . . )

Office of Environmental Analysis (OEA) worked with the Authority and the Federal Railroad Administration (FRA) in the preparation of a Final EIS for the Line.<sup>3</sup> OEA was given a field tour of the project area and conducted independent reviews of the drafts of the Final EIS, which was issued on April 18, 2014. After reviewing the Final EIS and FRA's Record of Decision (ROD) addressing comments received on the Final EIS, as well as environmental comments submitted to the Board and the Authority's replies, OEA prepared a detailed Environmental Memorandum dated July 11, 2014, supporting its recommendation that the Board adopt the Final EIS in any decision granting the Authority's petition.<sup>4</sup>

In this decision, we accept OEA's recommendation to adopt the Final EIS, which we find took a "hard look" at the potential environmental impact of the project, selected an environmentally preferred route from a list of alternatives, and recommended extensive environmental conditions to avoid, minimize, or mitigate the project's potential environmental impact. After weighing the entire record on both the transportation merits and the environmental issues, the Board grants the Authority's petition for exemption<sup>5</sup> subject to various environmental mitigation conditions, including: (1) construction of the route designated by FRA as environmentally preferable, (2) compliance with the mitigation imposed by FRA in its ROD, and (3) compliance with three additional environmental conditions recommended by OEA.

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( . . . continued)

with licensing authority over the project the environmental information they need to perform their regulatory responsibilities.

<sup>3</sup> Prior to OEA's involvement with the Final EIS for the Line, a number of other environmental reviews of the HST System were completed by the Authority and FRA. During these environmental reviews, as well as the reviews pertaining to the Line itself, the Authority served as the lead state agency for compliance with the California Environmental Quality Act (CEQA), and FRA and the Authority served as co-leads for compliance with NEPA. These joint reviews have produced single environmental documents titled "environmental impact reports/environmental impact statements" (EIR/EIS) to meet the obligations of both CEQA and NEPA, respectively. The Board is only required to comply with NEPA and thus became a cooperating agency for the preparation of the Final EIS for the Line. Accordingly, future references to the environmental documentation prepared in this case will use the term "EIS."

<sup>4</sup> The Environmental Memorandum is attached as an appendix to this decision.

<sup>5</sup> Should the Authority construct the Line pursuant to the authority granted in this decision, it will acquire a common carrier obligation to provide service over the Line even though it has not expressly sought operating authority. Moreover, if the Authority decides to delegate operational responsibilities for the Line to another entity, that entity will need to request operating authority from the Board before beginning operations. See Port of Moses Lake—Constr. Exemption—Moses Lake, Wash., FD 34936, slip op. at 2 & n.1 (STB served Aug. 27, 2009) (citing Big Stone-Grant Indus. Dev. & Transp., L.L.C.—Constr. Exemption—Ortonville, Minn., FD 32645 (ICC served Sept. 26, 1995)).

## BACKGROUND

The HST System. As noted, the Line is the second segment of the planned HST System to come before the Board. The HST System would, when completed, provide high-speed intercity passenger rail service over more than 800 miles of new rail line throughout California.<sup>6</sup> The complete system would connect the major population centers of Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the “Inland Empire” (i.e., the region east of the Los Angeles metropolitan area), Orange County, and San Diego. The Authority states that it plans to contract with a passenger rail operator to commence HST System operations once it completes construction of the portion of the HST system between Merced and the San Fernando Valley, which includes the Line.

As part of its business plans, the Authority envisions “the integration of high-speed trains with existing intercity and commuter/regional rail systems via coordinated infrastructure . . . and scheduling, ticketing and other means.”<sup>7</sup> Under this “blended” implementation strategy, the first construction sections would share infrastructure with existing passenger rail systems to “accelerate and broaden benefits, improve efficiency, minimize community impacts, and reduce construction costs,” prior to the initiation of high-speed rail service.<sup>8</sup> During this interim period, existing passenger rail services, such as the San Joaquin intercity rail service of the National Railroad Passenger Corporation (Amtrak), could operate “improved service” over the first portion of the HST System to be constructed.<sup>9</sup> Once the HST System is operational, the Authority expects that connections between the HST System and existing transit systems would

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<sup>6</sup> Last year the Board granted an exemption (with Vice Chairman Begeman dissenting) for construction of the first segment of the HST System, between Merced and Fresno, Cal. See Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cnty., Cal. (Merced-to-Fresno), FD 35724 (STB served June 13, 2013). In a letter filed in this proceeding on June 5, 2014, Michael E. LaSalle urges the Board, “on its own motion,” to reopen that exemption in light of “new facts and circumstances.” LaSalle has not met the standard for reopening under 49 C.F.R. § 1115.4. That provision states that “[a] petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances,” and LaSalle has not made detailed arguments as to any of these factors. Therefore, the Board declines to reopen Merced-to-Fresno.

<sup>7</sup> Authority’s April 2012 Revised Business Plan (2012 RBP) ES-5. In April 2014, the Authority issued its 2014 Business Plan (2014 RBP), which, among other things, summarizes the progress made over the last two years and updates information and forecasts that were presented in the 2012 RBP. We take official notice of both documents. Links to the 2012 RBP and 2014 RBP are available on the Authority’s website at [http://www.hsr.ca.gov/About/Business\\_Plans/index.html](http://www.hsr.ca.gov/About/Business_Plans/index.html).

<sup>8</sup> Final EIS at 1-35.

<sup>9</sup> Id. at 1-36.

remain important, significantly enhancing the statewide passenger transportation network by creating feeder services between the HST System and existing transit.<sup>10</sup>

The State of California determined that there is a need for a high-speed passenger rail system to improve the State's intercity transportation, which lacks sufficient capacity to accommodate current and expected future travel demand.<sup>11</sup> In November 2008, California voters passed Proposition 1A, a statewide ballot measure that provided a \$9.95 billion general obligation bond measure with \$9 billion going towards funding of the HST System. Pursuant to Proposition 1A, the Authority secured over \$2 billion in bond proceeds to be invested in the section of the HST System extending from north of Fresno to Bakersfield.

At the Federal level, the Passenger Rail Investment and Improvement Act of 2008 authorizes the Secretary of Transportation to establish and implement a high-speed rail corridor development program and to award grants to finance intercity passenger rail capital costs.<sup>12</sup> Congress appropriated over \$10 billion to develop a national network of high-speed rail corridors—\$8 billion in capital assistance for high-speed rail corridors and intercity passenger rail service under the American Recovery and Reinvestment Act of 2009 (ARRA),<sup>13</sup> and over \$2 billion through annual appropriations.<sup>14</sup>

In April 2009, FRA issued its High-Speed Rail Strategic Plan, "A Vision for High-Speed Rail in America," which laid the foundation for its long-term program to establish a network of high-speed rail corridors and detailed the application requirements and procedures for obtaining funding for high-speed rail projects under ARRA and the Department of Transportation Appropriations Acts of 2008 and 2009. FRA's High-Speed Intercity Passenger Rail Program (HSIPR) set out the criteria under which grant applications for high-speed rail projects would be evaluated and selected. Based on applications submitted by the Authority and environmental review documentation prepared by the Authority and FRA, FRA selected the Authority to receive \$3.49 billion in grant funds, primarily for the initial construction section of the HST System, between north of Fresno and Bakersfield.

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<sup>10</sup> 2012 RBP at 2-9.

<sup>11</sup> See ROD at 12 (explaining, *inter alia*, that: (1) the current intercity transportation system has not kept pace with the increase in population, economic activity, and tourism in the state; (2) current and projected system congestion will continue to result in deteriorating air quality, reduced reliability, and increased travel times; (3) the interstate highway system, commercial airports, and conventional passenger rail system serving the intercity travel market are operating at or near capacity and will require large public investments for maintenance and expansion to meet existing demand and future growth; and (4) the feasibility of expanding many major highways and key airports is uncertain).

<sup>12</sup> 49 U.S.C. §§ 24402, 26106.

<sup>13</sup> Pub. L. No. 111-5, 123 Stat. 115.

<sup>14</sup> See Final EIS at 1-5.

The Fresno-to-Bakersfield Line. The Line would connect a Fresno station, a Kings/Tulare regional station in the Hanford/Visalia/Tulare area, and a Bakersfield station. At the northern terminus, a station at Fresno would connect the Line to the previously authorized Merced-to-Fresno portion of the HST System. South of the Bakersfield station, the HST System would continue to Los Angeles via Palmdale. As noted in the Final EIS, the Line, as part of the Central Valley section of the HST System, would provide Fresno, Visalia, Tulare, Hanford, and Bakersfield access to a new transportation mode; contribute to increased mobility throughout California; and provide a potential location for a heavy maintenance facility, where high-speed trains would be assembled and maintained.<sup>15</sup> The Final EIS further notes that, because a minimum of 100 miles of track is needed to demonstrate train speeds of up to 220 miles per hour, the Line would provide a sufficient length of track for train testing.<sup>16</sup>

Environmental Review. As discussed herein, as well as in the ROD and the Environmental Memorandum, a number of environmental reviews pertaining to the Fresno-to-Bakersfield Section were conducted jointly by the Authority and FRA before this proceeding began. During these reviews, the Authority was the lead state agency for compliance with CEQA, and FRA and the Authority were co-leads for compliance with NEPA.

*Programmatic EIS.* The environmental review was conducted in two parts: a programmatic review and a project-level review. In 2005, the Authority and FRA finalized a Program EIS—a programmatic analysis addressing the implementation of the entire HST System across the State of California. The document also enabled the Authority and FRA to select preferred alignments and station locations for most of the HST System for further analysis in project-level documents. A second programmatic EIS document was finalized in 2008, but revised in 2010 and 2012 as a result of two CEQA-based legal challenges.

*Project-Level EIS.* The Authority and FRA then jointly began project-level analyses for each section of the proposed HST System, beginning with the Merced-to-Fresno Section. As pertinent here, the Authority and FRA jointly led a project-level environmental review of the Line (the Fresno-to-Bakersfield Section) under NEPA, and the Authority was lead agency for state review under CEQA. The U.S. Army Corps of Engineers has served as a cooperating agency in the NEPA review of the Line. In August 2011, FRA and the Authority issued a Draft EIS for public review and comment. During the public comment period, public information meetings and public hearings were held in communities situated along the Line's proposed alternative alignments. In response to stakeholder, agency, and public feedback on the seven alignment alternatives presented in the Draft EIS, the Authority and FRA issued a Supplemental Draft EIS in July 2012, to include additional route and station options. An additional 90-day public comment period was provided on the revised draft, and the Authority and FRA held additional public workshops and public hearings on that document. A Final EIS was issued in April 2014 and made available to the public for a 30-day comment period.<sup>17</sup> Throughout the

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<sup>15</sup> Final EIS at 1-7.

<sup>16</sup> Id.

<sup>17</sup> 79 Fed. Reg. 23,057 (Apr. 25, 2014).

environmental review process, the Authority held over 850 meetings and technical working groups in counties and cities that could be impacted by the Line.

Following the Board's decision on April 18, 2013, that it had jurisdiction over the proposed 800-mile HST System, the Board requested cooperating agency status for the remaining project-level EISs, which FRA granted in August 2013. After the Board became a cooperating agency for the NEPA environmental review of the Line, OEA was given a field tour of the project area in September 2013. Because the comment period on the project-level Draft EIS and Supplemental Draft EIS had already closed, the Board did not solicit additional comments on environmental matters in its decision instituting this proceeding. As a cooperating agency, the Board, through OEA, worked with FRA and the Authority in preparing the Final EIS for the Line (including reviewing and commenting on drafts of the Final EIS). OEA also reviewed the environmental comments submitted to the Board, along with the Authority's replies (dated June 17, 2014, and June 24, 2014) to comments raising concerns about potential effects on Mercy Hospital in Bakersfield and BNSF Railway (BNSF), respectively.<sup>18</sup> The purpose of OEA's reviews and participation as a cooperating agency was to determine whether the Final EIS adequately assesses the potential environmental impacts of the Line and meets the standards of both CEQ's NEPA regulations and the Board's environmental regulations at 49 C.F.R. § 1105. Furthermore, OEA assessed the environmental mitigation in the Final EIS and the need for any additional environmental mitigation should the Board grant the Authority's petition.

The Final EIS identifies the purpose of and needs to be served by the proposed Line, evaluates a reasonable range of build alternatives (as well as the No-Action Alternative), assesses the potential environmental impacts of the various alternatives, and identifies a preferred alternative and an extensive list of measures to avoid, minimize, and mitigate potential environmental impacts. Resource areas and topics addressed in the Final EIS include transportation; air quality and climate change; noise and vibration; biological resources; water resources and wetlands; agricultural lands; socio-economics; residential, business and other displacements; safety and security; parks and recreation; and aesthetics and visual resources. Potential cumulative impacts and potential disproportionate impacts to low-income and minority communities are also addressed.

*FRA's Record of Decision.* FRA issued its ROD for the Line on June 27, 2014. Based on an analysis of potential project impacts and substantive agency and public comments, including comments filed after issuance of the Final EIS, FRA approved a Preferred Build Alternative that includes portions of the so-called "BNSF Alternative" in combination with the "Corcoran Bypass," "Allensworth Bypass," and "Bakersfield Hybrid" alternatives.<sup>19</sup> The

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<sup>18</sup> While the Board did not solicit environmental comments in this proceeding, all environmental comments and replies have been accepted and considered in the interest of compiling a complete record.

<sup>19</sup> A description of these alternatives (and stations), and an explanation as to why FRA found them to be environmentally preferable, are set forth in the ROD at 13-27, 43. See also the map attached to the Environmental Memorandum in the appendix to this decision.

Preferred Build Alternative also includes two stations: the Kings/Tulare Regional Station-East Alternative and the Bakersfield Station – Hybrid Alternative.<sup>20</sup>

FRA also adopted an extensive Mitigation Monitoring and Enforcement Plan (MMEP) that identifies practicable mitigation measures designed to avoid, minimize, or mitigate potential adverse environmental impacts from construction and operation of the Line.<sup>21</sup> FRA and the Authority developed these measures in consultation with appropriate agencies and with input from the public and other interested parties. FRA's ROD requires the Authority to comply with all the mitigation measures in the MMEP. As discussed in greater detail in the Environmental Memorandum, the mitigation measures required by FRA would minimize the impacts of the Line on a number of resource areas, including transportation, safety and security, noise and vibration, land use, agriculture, air quality, and visual aesthetics.

*The Board's Environmental Review.* After the ROD was released, OEA issued its Environmental Memorandum to the Board to support its recommendation that the Board: (1) adopt the Final EIS to comply with its NEPA obligations concerning the Line, and (2) impose four additional environmental conditions, as discussed below. OEA's memorandum summarizes the proposed construction, the environmental review of the Line that has taken place, and the environmental comments and responses to comments received by the Board. As discussed in the Environmental Memorandum, OEA has concluded that the Final EIS adequately assesses the potential environmental impacts associated with the proposed Fresno-to-Bakersfield HST Section, meets the standards of CEQ's NEPA regulations and the Board's own environmental regulations at 49 C.F.R. Part 1105, and adequately responds to OEA's substantive comments and suggestions. OEA has further concluded that Board adoption of the Final EIS (including FRA's preferred alternative) and the mitigation in FRA's ROD, as well as OEA's other final environmental mitigation recommendations, will satisfy the Board's NEPA obligations in this case.

Public Comments on the Transportation Merits. The City of Bakersfield, the Community Coalition on High Speed Rail (CC-HSR), County of Kings, the Kings County Water District and Citizens for California High-Speed Rail Accountability (KCWD/CCHSRA), and several individual private citizens filed comments in opposition to the petition for exemption. The Board received comments in support of the petition from the Fresno Council of Governments, the Fresno County Economic Development Corporation, City of Fresno Mayor Ashley Swearengin, City of Fresno City Manager Bruce Rudd, Fresno Works, and joint comments from the Brotherhood of Maintenance of Way Employees Division/IBT, the Brotherhood of Railroad Signalmen, and the International Association of Sheet Metal, Air, Rail, and Transportation Union/Mechanical Division.

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<sup>20</sup> For Fresno, the Downtown Fresno Mariposa Street Station Alternative was a component of the Preferred Build Alternative approved by the Board in its final decision authorizing construction of the Merced-to-Fresno HST Section.

<sup>21</sup> The MMEP is Attachment C to FRA's ROD. Links to the ROD and the ROD appendices are available at: <http://www.fra.dot.gov/Page/P0468>.

On March 27, 2014, the Authority filed a response to the public comments, together with a motion for leave to file a response. The Board's rules at 49 C.F.R. § 1104.13(c) prohibit a "reply to a reply." However, in the interest of compiling a more complete record, we will accept the Authority's reply to the public comments.<sup>22</sup>

## DISCUSSION AND CONCLUSIONS

Independent Utility. The Authority seeks an exemption from the Board's prior approval requirements for authority to construct the Line, a 114-mile section of the planned 800-mile HST System. Where, as here, authority is sought for only a section of a larger project, the Board first must determine whether consideration of that section in isolation would constitute an improper segmentation of Board review of the transportation merits of the larger project.<sup>23</sup> To determine whether Board review of a particular section of a larger project is appropriate, the Board examines whether the section has independent utility by assessing whether the proposed segment has logical termini and transportation benefits even if subsequent sections are never constructed.<sup>24</sup>

Fresno and Bakersfield are logical termini for the Line. As noted in the Final EIS, they are two of the largest cities in the San Joaquin Valley, thus providing potential ridership for the Line; moreover, both cities are surrounded by metropolitan areas and are economic hubs within the region.<sup>25</sup> As with the Merced-to-Fresno Section, transportation benefits would be realized even if the Line is constructed and subsequent sections of the HST System are never built. As noted in the Final EIS and FRA's ROD, California's existing intercity transportation system, including the portion covering the south San Joaquin Valley, is insufficient to meet existing and future travel demand.<sup>26</sup> Making improvements to existing systems would benefit current passenger service by improving efficiency and service on existing passenger rail.<sup>27</sup> In particular, the Line could serve as an alternative option for Amtrak's passenger rail service between Fresno and Bakersfield (otherwise known as the San Joaquin Route), which Amtrak currently provides by operating over lines owned by BNSF.<sup>28</sup>

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<sup>22</sup> Accordingly, requests filed separately by William C. Descary, Aaron Fukuda, and Michael E. LaSalle to deny the Authority's motion for leave to reply will be denied.

<sup>23</sup> See Merced-to-Fresno, slip op. at 15-17.

<sup>24</sup> Merced-to-Fresno, slip op. at 15-16; see also Adler v. Lewis, 675 F.2d 1085, 1096-97 (9th Cir. 1982) (setting out two additional factors less relevant here); Lange v. Brinegar, 625 F.2d 812, 815-16 (9th Cir. 1981); Futurex Indus., Inc. v. ICC, 897 F.2d 866, 872 (7th Cir. 1990); Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir. 1975).

<sup>25</sup> Final EIS at 16-49.

<sup>26</sup> Id. at 1-7; ROD at 12.

<sup>27</sup> Final EIS at 1-36.

<sup>28</sup> Id. at 1-16.

The Authority has determined that some of Amtrak's San Joaquin operations could be shifted to the Line on an interim basis prior to the commencement of high speed rail operations,<sup>29</sup> thus creating additional capacity for passenger service even if subsequent sections of the HST System are never built. This alternative passenger service, if implemented, would be integrated with the Altamont Commuter Express (ACE) service, Capitol Corridor service, and Caltrain service, and would reach from Bakersfield to the San Francisco Bay area and beyond to Sacramento.<sup>30</sup> In addition, other potential interim service options could be developed as part of a larger statewide planning effort led by the California State Transportation Agency prior to the commencement of high speed rail service.<sup>31</sup>

KCWD/CCHSRA question whether the Line in fact will be used for Amtrak operations in the interim, given that the San Joaquin Joint Powers Authority (the organization that currently administers and operates Amtrak's San Joaquin service) has made no commitment to run Amtrak trains on the Line when completed. KCWD/CCHSRA also note that no agreements have been reached with BNSF regarding any proposed or potential alignment or change in the San Joaquin service. But as the Board noted in its decision in Merced-to-Fresno, a party may seek an exemption before all outstanding issues have been resolved. Moreover, while the Authority has not yet finalized an agreement with Amtrak or another passenger rail provider for interim use of the Line, such an agreement could be reached at a later date.

Given that Fresno and Bakersfield serve as logical endpoints, and that the availability of the Line for other passenger service would provide transportation benefits to the Central Valley even without the construction of additional sections of the HST System, we conclude that the Authority has proposed construction of a section of the HST System that we may consider at this time.

Rail Transportation Analysis. The Board's review of the construction of new railroad lines that are to be part of the interstate rail network may take one of two forms. Under 49 U.S.C. § 10901, an applicant may file a full application for authority to construct the proposed line. Section 10901(c) directs the Board to grant such an application "unless the Board finds that such activities are inconsistent with the public convenience and necessity." Thus, Congress has established a presumption that, unless shown to be otherwise, rail construction projects are in the public interest and should be approved.<sup>32</sup>

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<sup>29</sup> Id. at 1-25 to 1-26, 2-114.

<sup>30</sup> Id. at 1-36.

<sup>31</sup> Id. at 16-50.

<sup>32</sup> See N. Plains Res. Council v. STB, 668 F.3d 1067, 1091-92 (9th Cir. 2011); Mid States Coal. for Progress v. STB, 345 F.3d 520, 552 (8th Cir. 2003); Alaska R.R.—Constr. & Operation Exemption—Rail Line Between N. Pole & Delta Junction, Alaska, FD 34658, slip op. at 5 (STB served Jan. 6, 2010).

Alternatively, as the Authority has done here, an applicant may petition the Board for an exemption under 49 U.S.C. § 10502(a) from the prior approval requirements of § 10901.<sup>33</sup> The statute provides that the Board “shall exempt” a transaction (including a construction proposal) in whole or in part if: (1) application of the statutory provision from which exemption is sought (here § 10901) is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (RTP); and (2) either (a) the transaction is of limited scope or (b) application of the statutory provision is not needed to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a).<sup>34</sup> Congress thus has directed the Board to exempt a rail construction proposal from the requirements of the full application process—even if significant in scope—so long as the application of § 10901 is not necessary to carry out the RTP and there is no danger of market power abuse.<sup>35</sup>

*Application v. Petition.* A number of commenters argue that the Board should deny the Authority’s petition for exemption and require a full application in light of legal challenges to the proposed project’s financing mechanisms. These commenters argue that the Authority’s financial viability depends on the outcome of judicial proceedings pending in the California Court of Appeals that effectively restrict the Authority’s access to State bond funds in the interim. CC-HSR, KCWD/CCHSRA, and other commenters assert that restricted access to state bond funding would impact the availability of federal grant money, which must be matched and spent by 2017. These commenters also note that, in addition to the Authority’s current inability to access State bond funds, the projected costs of construction have escalated considerably and exceed the approximately \$6 billion in Federal grants and State bond funds the Authority has received to construct the initial section of the HST System from north of Fresno to Bakersfield. These commenters further argue that a publicly funded project that currently has no private investment requires greater scrutiny. Given the alleged uncertainty surrounding the Authority’s ability to finance construction of the Line, much less the entire HST System, these commenters argue that the Board should deny the Authority’s petition and require the Authority to file a full application under § 10901.

However, there is nothing in the language of § 10502 to suggest that an exemption proceeding is necessarily improper when the viability of the proposed rail line is questioned.<sup>36</sup>

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<sup>33</sup> Use of the exemption process does not mean that the transaction is unregulated. See Vill. of Palestine v. ICC, 936 F.2d 1335, 1337 (D.C. Cir. 1991) (noting that an exemption “streamlines” the regulatory process).

<sup>34</sup> Exemptions are to be used “to the maximum extent” consistent with our governing statute. 49 U.S.C. § 10502(a); see also H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4137 (directing the agency to use its exemption authority aggressively).

<sup>35</sup> Alaska Survival v. STB, 705 F.3d 1073, 1082-83 (9th Cir. 2013); Vill. of Palestine, 936 F.2d at 1337, 1340.

<sup>36</sup> Alaska Survival, 705 F.3d at 1082 (affirming the Board’s exemption proceeding even where financial viability of the line was questioned).

Furthermore, the commenters have not persuaded us that we need the financial information required in a § 10901 application in order for us to decide whether to authorize the proposed construction.

The Board's grant of authority to construct a line (whether under § 10901 or by exemption under § 10502) is permissive, not mandatory—that is, the Board does not require that an approved line be built.<sup>37</sup> As a result, the Board has repeatedly recognized that the decision to go forward with an approved project ultimately is in the hands of the applicant and its potential investors (whether public or private) and not this agency.<sup>38</sup> Accordingly, the Board may grant authority to construct a line even if all outstanding issues related to the proposed construction have not yet been resolved or if factors beyond the Board's control (such as the outcome of pending litigation in the California courts related to funding or Proposition 1A) might ultimately prevent consummation of the proposed construction. While the commenters have argued that these court proceedings amount to a dramatic change in circumstances that should lead us to deny the exemption, it is not our role to determine whether the Authority has complied with state or Federal funding requirements. That is an issue to be decided by the appropriate courts.

Further, as discussed in Merced-to-Fresno, slip op. at 20, nothing in our statute or governing precedent requires that publicly funded projects be subjected to a greater degree of scrutiny than privately funded projects. With respect to the Line, funding decisions have been made by bodies empowered to make those decisions, including FRA and the voters of California,<sup>39</sup> and we will not use our licensing process to revisit determinations already made by various Federal, state, and local government interests with a stake in the matter.<sup>40</sup> Furthermore, the Board's environmental review would have been no different had the Board examined this project under § 10901 rather than § 10502.

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<sup>37</sup> See Mid-States, 345 F.3d at 552 (agreeing with the Board that financial markets will ultimately determine if a rail line is constructed).

<sup>38</sup> U.S. Dep't of Energy—Rail Constr. & Operation—Caliente Rail Line in Lincoln, Nye & Esmeralda Cnty., Nev., FD 35106, slip op. at 3 (STB served June 27, 2008).

<sup>39</sup> KCWD/CCHSRA argue that the Authority has not complied and cannot comply with FRA's requirements for its grant, but our role does not include assessing whether a party has complied with another agency's grant requirements. Our construction authority is permissive, and it is up to the Authority to resolve with FRA any issues related to FRA's grant requirements.

<sup>40</sup> Given the financial scrutiny that has already been given to this project by FRA and the State, and the available information before us on funding, including the Authority's 2012 and 2014 Business Plans and the commenters' extensive comments, we would learn little more about available funding for the Line if we were now to require the Authority to file an application. The commenters requesting an application have not shown that the application process is needed in this proceeding to allow us to meet our statutory obligations. Moreover, the delay that would result from requiring an application could make this publicly funded project—which has already been heavily scrutinized—more expensive, contrary to the public interest. Accordingly, here, as in cases such as Alaska Survival, there is no need to require an application, and it is reasonable to use the more streamlined exemption process.

Moreover, contrary to CC-HSR's comments, the ICC's decision in Ozark Mountain Railroad—Construction Exemption, FD 32204 (ICC served Sept. 25, 1995), does not require that an application be filed here. In Ozark Mountain, the agency required an application because the project proponent was an entirely unknown entity that had provided no information on its investors or how it proposed to finance the construction of an estimated \$300 million rail line. Ozark Mountain R.R.—Constr. Exemption, FD 32204 (ICC served Nov. 22, 1994). In contrast, the Authority is a known California state agency which, with regard to this Line, has received partial funding from a Federal grant. Unlike the mysterious investors in Ozark Mountain, it is public knowledge that the State of California receives billions of dollars in tax revenues annually, and it is not for the Board to second guess California's budget priorities.

In short, we have before us all the information we need to consider the Authority's construction proposal, and the use of an application proceeding under § 10901 is not required here.<sup>41</sup>

*Analysis Under § 10502.* As noted above, we must exempt a proposed rail line construction when we find that application of the provisions of § 10901 is not necessary to carry out the RTP and there is no danger of market power abuse. Based on the record before us, we conclude that the proposed construction qualifies for an exemption under § 10502 from the § 10901 prior approval requirements.

Detailed scrutiny of the proposed construction under § 10901 is not necessary to carry out the RTP in this case. At the outset, it is worth noting that the State has determined that California's existing passenger transportation infrastructure is at or near capacity. The complete HST System that is planned (of which the Line is a part) would connect virtually all of California's major population centers. Further, the Line would provide an additional mode of efficient transportation service between Fresno and Bakersfield, an area that currently has limited connectivity to the state's larger metropolitan areas.<sup>42</sup> The Line also would improve mobility and connectivity to airports, mass transit, and the highway network in the San Joaquin Valley and contribute to increased rail passenger capacity to meet the growing demand for intercity travel in California.<sup>43</sup> Several parties have raised concerns regarding the impact of the Line on current passenger rail service, arguing that its potential impact on Amtrak would be inconsistent with other RTP factors.<sup>44</sup> The record here, however, shows that the construction of the Line would result in improved and faster service, thus enhancing existing intercity passenger rail

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<sup>41</sup> In light of the extensive information that is already on the record before us on both the transportation-related and environmental issues, we disagree with the commenters' suggestion that a public hearing is necessary for us to decide whether an exemption is proper in this case.

<sup>42</sup> Final EIS at xiv, 1-7; ROD at 12.

<sup>43</sup> Final EIS at 1-7; ROD at 12.

<sup>44</sup> See, e.g., KCWD/CCHSRA at 18-19.

service and benefitting the traveling public.<sup>45</sup> In short, by providing another travel option, the Line would enhance intermodal competition and increase capacity, as well as promote the development of a sound rail transportation system to meet the needs of the traveling public, consistent with 49 U.S.C. §§ 10101(4) and (5).

Construction of the Line would also be consistent with 49 U.S.C. § 10101(14), in that it would encourage and promote energy conservation by diverting automobile trips and commercial air flights to electrified train travel, a more energy-efficient form of transportation.<sup>46</sup> In doing so, the proposed Line would relieve capacity constraints that have resulted in increased congestion, as well as reduce air pollution. Some commenters contend that there is uncertainty as to whether the Line will be electrified and used by high-speed trains,<sup>47</sup> but such concerns are speculative. The Authority's proposal for high-speed trains on an electrified system is both plausible and supported.

Lastly, exempting the proposed construction would reduce the need for Federal regulation and reduce regulatory barriers to entry consistent with 49 U.S.C. §§ 10101(2) and (7). As discussed in Merced-to-Fresno, any decision to lighten regulation could be viewed as comporting with these deregulatory RTP factors, which themselves reflect the overriding intent of the exemption statute: absent a good reason for full regulation, we should be looking toward exemption or relaxation of unneeded regulatory burdens. Given the significant amount of public information and prior government analysis regarding the Line that is available to the Board and the public,<sup>48</sup> it is appropriate for the Board to reduce "regulatory barriers to entry into . . . the industry" and eliminate delay by processing the Authority's construction request under the more streamlined exemption provision.

Several commenters contend that construction of the proposed Line is inconsistent with other RTP factors, such as the establishment and maintenance of reasonable rates (§§ 10101(1) and (6)), allowing carriers to earn adequate revenues (§ 10101(3)), the impact on public health and safety (§ 10101(8)), and the encouragement of honest and efficient management of railroads

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<sup>45</sup> 2012 RBP at 2-14; Final EIS at 2-114.

<sup>46</sup> See Final EIS at 3.6-73 to 3.6-76.

<sup>47</sup> City of Bakersfield at 2; Reply of William Descary at 2.

<sup>48</sup> Contrary to commenters' claims, the Board provided adequate notice and opportunity to participate in this proceeding. The Board extended the standard 20-day period for comments on the transportation merits several times, ultimately giving the public more than five months from the filing date of the Authority's petition to develop and submit their comments. To assure adequate notice of the Board's proceeding, the Board also published a Federal Register notice and required the Authority to notify all parties of record in Merced-to-Fresno of the filing of its petition for exemption here. See Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667-68 (9th Cir. 1989) (Federal Register notice is legally sufficient notice to all affected parties regardless of actual notice or hardship resulting from ignorance).

(§ 10101(9)).<sup>49</sup> However, the Board has previously held that it will look to those portions of the RTP that are relevant or pertinent to the underlying statutory provision from which exemption is sought—here, 49 U.S.C. § 10901—in considering petitions for exemption under § 10502.<sup>50</sup> Otherwise, the Board would be “faced with the impossible task of reconciling a variety of different objectives” in the RTP.<sup>51</sup> Here, we have determined that §§ 10101(2), (4), (5), (7) and (14) of the RTP are policy goals promoted by § 10901.<sup>52</sup>

In addition, no party has provided any evidence to support the notion that authorizing this construction project through the exemption process would adversely affect the establishment and maintenance of rates or the availability of cost information. See §§ 10101(1) & (6). Nor has any party explained how granting an exemption for the Line’s construction would prevent the Authority from earning adequate revenues. See § 10101(3). Further, the parties have failed to show how authorization of the Line’s construction through the exemption process would undermine the efficient management of railroads (i.e., the internal operations of a railroad). See § 10101(9). Lastly, the potential health and safety impacts related to this proposal were fully analyzed during the environmental review process. See § 10101(8). Although many construction projects entail some degree of adverse environmental consequences, passenger rail operations, once construction is complete, are among the most environmentally friendly modes of transportation. Additionally, the extensive environmental mitigation that will be imposed on this project will eliminate or minimize potential impacts on public health and safety to the extent practicable.

Furthermore, we conclude that regulation of the proposed transaction is not necessary to protect against an abuse of market power. As with the Merced-to-Fresno Section, the Line will not be used to provide freight rail transportation to shippers, and will cause no shipper to lose access to a rail option as a result of the proposed construction.<sup>53</sup> Thus, construction of the Line is essentially neutral with regard to market power in the freight rail industry. The Board has also examined whether the Line would result in an abuse of market power detrimental to the traveling public. Several commenters raise concerns that, once Amtrak moves its San Joaquin service

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<sup>49</sup> KCWD/CCHSRA at 18-19, City of Bakersfield at 1-3, Reply of William Descary at 1-3, Reply of Carol Bender at 1.

<sup>50</sup> Vill. of Palestine, 936 F.2d at 1338-39; Alaska Survival, 705 F.3d at 1083.

<sup>51</sup> Alaska Survival, 705 F.3d at 1083 (quoting Oregon Pub. Util. Comm’n v. ICC, 979 F.2d 778, 781 (9th Cir. 1992)).

<sup>52</sup> See also Alaska Survival, 705 F.3d at 1084 (finding reasonable the Board’s decision to consider only RTP factors (2), (4), (5), and (7)).

<sup>53</sup> In its comments on the Final EIS, BNSF raises concerns about the proposed route alternatives for the Line restricting BNSF’s ability to construct new spur lines for potential future customers. BNSF’s concerns are speculative, though, as BNSF identifies no shipper who may lose access. We anticipate that, if the Line should at some point in the future impact the construction of spur track to serve a potential BNSF customer, the Authority and BNSF could reach a mutually agreeable solution.

onto the HST System, the new track alignments will bypass current Amtrak stations in Fresno, Hanford, and Corcoran by significant distances.<sup>54</sup> According to the Final EIS, however, the Authority anticipates having only some Amtrak San Joaquin trains operate on the Line as an “express” service between Madera and Bakersfield with a single stop in Fresno; other Amtrak San Joaquin trains would remain on the existing BNSF route and continue to serve existing San Joaquin Amtrak stations such as Hanford.<sup>55</sup> Further, as the Board noted in Merced-to-Fresno, preexisting alternative means of moving passengers, such as buses and private automobiles, provide other means of transportation in the event that certain station access is reduced.<sup>56</sup> Overall, construction of the Line would result in new and more efficient passenger rail service and create better options for the traveling public. We therefore find no abuse of market power.<sup>57</sup>

*Issues Raised by BNSF.* On May 7, 2014, BNSF submitted comments in response to the Final EIS. While addressing primarily environmental issues (discussed below and in the Environmental Memorandum), BNSF also raises concerns about the Line’s potential impact on BNSF’s operations, specifically the Authority’s plans to relocate portions of BNSF’s right-of-way and to acquire portions of BNSF property. BNSF also raises concerns regarding locations where the Line’s proposed route would cross BNSF’s line. The Authority filed a reply on June 24, 2014, noting that it is in the process of negotiating an agreement with BNSF to address the logistical issues related to the planned relocation of portions of BNSF’s right-of-way. The Authority also stated that the purchase of property for the HST right-of-way has not yet begun and that, when it does, efforts would be made to reach a mutually satisfactory agreement with property owners that takes into account impacts on properties and property owners’ interests, in accordance with applicable laws and regulations. The Authority adds that, while construction of the Line would involve the acquisition of some freight rail property, “[n]o permanent intrusion into the freight rail corridors is proposed.”<sup>58</sup> The Authority also states that it has had discussions with BNSF regarding where the proposed HST System would cross BNSF’s line and that the Final EIS examines the impact of these potential crossings.<sup>59</sup>

In construction cases, particularly of this size and complexity where a number of alternatives are considered, outstanding issues (including issues related to property rights) often remain unresolved at the time of the Board’s decision. As noted above, a party may seek, and the Board may grant, an exemption even though these issues have not yet been resolved. It appears that BNSF and the Authority have been actively engaged in discussions since 2009 and

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<sup>54</sup> See KCWD/CCHSRA at 18-19, Reply of Joyce Cody at 1; Reply of Karen J. Stout at 1-2.

<sup>55</sup> Final EIS at 16-50; see also *id.* at 2-114.

<sup>56</sup> Merced-to-Fresno, slip op. at 24.

<sup>57</sup> Given this finding under § 10502(a)(2)(B) regarding market power, we need not determine whether the transaction is limited in scope under 49 U.S.C. § 10502(a)(2)(A).

<sup>58</sup> Reply of Authority to BNSF at 11.

<sup>59</sup> *Id.* at 3.

continue to work toward reaching an agreement to address the concerns at hand. BNSF does not suggest that these issues cannot be resolved through negotiations. We therefore expect the parties to work out a mutually satisfactory arrangement that will allow this construction project to move forward while not unduly burdening or materially interfering with BNSF's operations.<sup>60</sup> We further note that BNSF or the Authority (or its eventual operator) if necessary may avail themselves of the Board's processes in the future by (for example) filing a complaint, a petition for declaratory order, a crossing petition under § 10901(d)(1),<sup>61</sup> or by utilizing the Board's alternative dispute resolution procedures.<sup>62</sup>

### Environmental Analysis.

*The Requirements of NEPA.* In reaching our decision to authorize construction of the Line, we have also considered the environmental impacts associated with its construction and operation. NEPA requires Federal agencies to examine the environmental effects of proposed Federal actions and to inform the public concerning those effects.<sup>63</sup> Under NEPA and related environmental laws, we must consider significant potential beneficial and adverse environmental impacts in deciding whether to authorize a railroad construction project as proposed, deny the

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<sup>60</sup> We also expect that the Authority will work out mutually satisfactory agreements with other railroads, if any, that might be affected by construction of the Line, including Union Pacific Railroad Company (UP). See KCWD/CCHSRA at 19-22 (suggesting that the proposed construction may affect the operations of UP and other freight railroads). See also Mitigation Condition (d), below (requiring the Authority to ensure that the construction management plan required by FRA's mitigation measures be expanded to address potential project-related construction impacts to freight railroad operations).

<sup>61</sup> Crossing arrangements between carriers are governed by 49 U.S.C. § 10901(d)(1), which requires that a carrier allow another carrier to cross its existing line if certain conditions to protect the operations of the crossed carrier from material or unreasonable interference are met. See, e.g., Ill. Cent. R.R.—Petition for Crossing Authority—in E. Baton Rouge Parish, La., FD 33877 (Sub-No. 1) (STB served May 13, 2002).

<sup>62</sup> Carol Bender, in a letter filed on March 14, 2014, and Michael LaSalle, in letters dated May 29, 2014, and July 22, 2014, raise concerns about the possible effects that the electrical systems of a high speed rail line might have on nearby BNSF and UP rail lines and utilities. LaSalle notes that the California Public Utilities Commission (CPUC) recently set a procedural schedule to allow parties to address these issues and suggests that the Board defer ruling on the Authority's petition for exemption until the CPUC proceeding is completed. However, the Authority has explained that it has been working with interested parties to mitigate the potential effects of electromagnetic interference on third-party facilities. Reply of Authority to BNSF at 8. In addition, the Authority's petition for exemption states (at 4) that high speed rail is not expected to begin until 2022, thereby providing ample time to resolve remaining issues involving high speed rail design and mitigation. In these circumstances, it is reasonable to issue our decision here despite the unresolved electromagnetic interference issues.

<sup>63</sup> Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983).

proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented in order to minimize or avoid potential adverse environmental impacts.<sup>64</sup> While NEPA prescribes the process that must be followed, it does not mandate a particular result.<sup>65</sup> Thus, once the adverse environmental effects have been adequately identified and evaluated, an agency may conclude that other values outweigh the environmental costs.<sup>66</sup>

*OEA's Review of Environmental Documents.* As noted above, OEA's Environmental Memorandum recommends that we adopt the Final EIS and FRA's mitigation and preferred alternative (including station locations), and addresses the key environmental concerns that were raised during the Board's proceeding.

As explained in more detail in the Environmental Memorandum, OEA received approximately two dozen comments from individuals, local governments, local institutions, a citizen's organization, a farming interest, a hospital in Bakersfield (Mercy Hospital), and a freight railroad (BNSF). The comments addressed a variety of issues, including whether enough consideration was given to rail alignments that used existing transportation corridors; the potential impact of the Line on noise and vibration at Mercy Hospital, particularly if pile drivers are used during the Line's construction; the effects of the Line on family farms and agricultural operations; the alleged failure of the Final EIS to assess environmental issues related to effects on BNSF's freight operations, such as the location of proposed grade separations and the existing at-grade road/BNSF crossings that would be eliminated; the uncertainty surrounding the purported interim Amtrak operations on the Line; concerns about adequate capacity to power the electrified HST System; and concerns about the risks to life and property from the derailment of a high-speed train or a terrorist attack. The Board also received replies from the Authority to the comment letters from BNSF and Mercy Hospital.<sup>67</sup>

As the Environmental Memorandum explains, most of the environmental concerns raised before the Board were previously raised in comments on the Draft EIS and the Supplemental Draft EIS, and were appropriately and adequately addressed in the Final EIS, FRA's ROD, and FRA's approximately 113-page MMEP mitigation plan. For example, the Environmental Memorandum explains that, notwithstanding Mercy Hospital's concerns, the Final EIS took the requisite hard look at the impacts from noise and vibration and that FRA's MMEP mitigation plan will minimize the impacts of train operations on the hospital to the extent practicable.<sup>68</sup> Thus, for the reasons set forth in the Environmental Memorandum, OEA concludes that the

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<sup>64</sup> Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989).

<sup>65</sup> Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

<sup>66</sup> Id.

<sup>67</sup> See Environmental Memorandum at § 4.2.4 (summarizing Mercy Hospital's concerns and the Authority's responses).

<sup>68</sup> See Environmental Memorandum § 4.0; ROD Appendix C.

commenters have not shown that the Final EIS for the Line was inadequate or incomplete, or should be supplemented.

In its Environmental Memorandum, OEA recommends that, to minimize potential environmental impacts to the extent possible, we require the Authority to construct FRA's environmentally preferred alternative (including station locations) and comply with FRA's MMEP mitigation plan. Additionally, to address Mercy Hospital's concerns about noise and vibration during project-related construction, OEA recommends that we impose mitigation prohibiting the Authority from using pile drivers within 300 feet of the south side of the hospital. OEA also recommends a condition requiring compliance with the Memorandum of Agreement developed through the Section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f. Lastly, because FRA's mitigation does not specifically require the Authority's construction management plan to address construction impacts on freight rail operations, and in response to BNSF's environmental concerns, OEA recommends mitigation requiring that, prior to initiating construction, the Authority ensure that the construction management plan cited in the FRA's MMEP Mitigation Measures LU-AM#2 and SO-AM#1 is expanded to specifically address potential project-related construction impacts to freight railroad operations.

*Our Conclusions on Environmental Issues.* After independently reviewing the environmental record for the Line—including the Final EIS, OEA's Environmental Memorandum, the environmental comments submitted to the Board, and the Authority's Reply to the post-Final EIS comments of BNSF and Mercy Hospital—we are satisfied that the Final EIS (prepared by the Authority and FRA with the Board's participation as a cooperating agency) has taken the requisite "hard look" at the potential environmental impacts associated with the Line as required by NEPA and complies with both the CEQ NEPA regulations and our environmental rules at 49 C.F.R. § 1105.<sup>69</sup> The Final EIS adequately identifies and assesses the environmental impacts discovered during the course of the environmental review, carefully compares a reasonable range of alternatives (including a No-Action Alternative), and includes extensive mitigation to avoid or minimize potential environmental effects. OEA's Environmental Memorandum further addresses and analyzes the key environmental topics associated with the project and the environmental concerns raised by the various commenters during the Board's proceeding. Accordingly, we adopt the Final EIS and all of OEA's analysis and conclusions in the Environmental Memorandum, including those not specifically addressed here. As explained in the Final EIS, the ROD, and the Environmental Memorandum, we also find that FRA's Preferred Build Alternative (including the selected station locations) best satisfies the purpose and need for the proposed Line and most effectively avoids, minimizes, and reduces impacts to the environment.

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<sup>69</sup> As explained in the Environmental Memorandum, upon the Board's receiving cooperating agency status in August 2013, OEA staff was given a field tour of this project in September 2013 that included all alternative alignments and alternative heavy maintenance facility locations analyzed in the Final EIS. OEA also conducted independent reviews of the Final EIS in draft form. OEA is satisfied that the Final EIS addresses the substantive comments and suggestions OEA made with respect to the draft documents it reviewed and adequately assesses the potential environmental effects associated with the Line.

Based on OEA's environmental review, the principal environmental issues associated with the Line pertain to the potential environmental impacts on transportation, safety and security, noise and vibration (including impacts to Mercy Hospital), biological resources, wetlands and water resources, property displacements (including loss of agricultural lands), parks and recreation, aesthetics and visual resources, and minority and low income populations. However, as explained in the Environmental Memorandum, FRA's mitigation and the additional mitigation recommended by OEA will avoid, minimize, and mitigate to the extent practicable the potential environmental impacts raised and examined during the environmental review. Other than OEA's four recommended conditions, no mitigation beyond the extensive mitigation already imposed by FRA in its MMEP has been shown to be appropriate here.

We find that construction of the preferred alternative, along with the environmental conditions we are imposing, will adequately minimize the potential environmental impacts of the Line to the extent practicable. As the Environmental Memorandum explains, certain unavoidable impacts will result from construction of the Line (including road closures, residential and business relocations, noise and vibration impacts, aesthetic and visual impacts, loss of agricultural lands, and severance and disruption of other farmlands and irrigation systems).<sup>70</sup> However, construction of the Line will also generate a variety of benefits, including transportation benefits to the regional transportation system, socioeconomic benefits, and air quality benefits from diverting intercity trips from regional roads to high-speed rail.<sup>71</sup> The Line also will increase energy efficiency by providing a travel alternative that is less energy-intensive than the cars and air travel that would otherwise be used.<sup>72</sup> Moreover, the Final EIS, ROD, and Environmental Memorandum show that all practicable means to avoid or minimize environmental harm have been adopted.

As discussed above, the proposed Line will provide the public with electric-powered high-speed rail service that provides predictable and consistent travel times between major urban centers with connectivity to airports, mass transit systems, and the highway system network in the San Joaquin Valley, while also providing a connection between the northern and southern portions of the HST System. The No-Action Alternative would satisfy neither the purpose of, nor the need for, the project—that is, it would fail to add a new transportation option to the current intercity transportation system, which is already congested, operating at or near capacity, and in need of large public investment for maintenance and expansion to meet existing and future demand.

*Memorandum of Agreement for Historic Review Process.* Section 106 of NHPA) (16 U.S.C. § 470f) imposes a responsibility on Federal agencies to: (1) “take into account the effect of” their licensing decisions (in this case, whether to grant the Authority's request for construction authority, also called the “undertaking” under NHPA) on properties included, or

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<sup>70</sup> See Environmental Memorandum § 3.3.

<sup>71</sup> See *id.*

<sup>72</sup> See Final EIS at 3.6-73 to 3.6-76.

eligible for inclusion, in the National Register of Historic Places (National Register), and (2) afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment prior to any grant of construction authority.<sup>73</sup> Consultations with the State Historic Preservation Officer (SHPO) are also required. If authorization of the construction would have an adverse effect on historic properties, the agency must continue those consultations in an attempt to avoid the adverse effects.<sup>74</sup>

As the lead Federal agency, FRA initiated the § 106 consultation process for the Line prior to OEA's involvement. During that process, FRA consulted with the California SHPO, ACHP, Federally-recognized tribal organizations, and other interested parties. The parties executed a Programmatic Agreement on June 11, 2011, setting out a general process for § 106 compliance for the entire proposed 800-mile HST System.

As explained in the Environmental Memorandum, section-specific NHPA review was conducted for the Line. The § 106 consultation process, as well as evaluations conducted during the NEPA review, identified properties that are included, or eligible for inclusion, in the National Register that would be adversely affected by the Preferred Build Alternative. Due to access restrictions, surveys for archaeological properties are incomplete; therefore, additional National Register-eligible properties could be present. The regulations implementing § 106 allow for the development of a Memorandum of Agreement (MOA) when the effects of an undertaking cannot be fully determined prior to its approval.<sup>75</sup> When there would be an adverse effect, the MOA can establish responsibilities for the treatment of historic properties, implementation of mitigation measures, and ongoing consultation efforts. In this case, the Board, the Authority, FRA, the U.S. Army Corps of Engineers, the SHPO, and ACHP executed an MOA on May 14, 2014, that outlines additional surveys, historic property treatment, mitigation measures, and other efforts that will take place.

We conclude that Board participation in the MOA will satisfy the Board's obligations under § 106, and we will impose the condition recommended by OEA requiring that the Authority comply with the MOA.

### Conclusion.

After weighing the various transportation and environmental concerns and considering the entire record, we find that the petition for exemption should be granted and that the Authority may construct the FRA-designated environmentally-preferred alternative identified in FRA's ROD, subject to compliance with the environmental mitigation measures set forth in the MMEP and the additional environmental conditions set forth below.

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<sup>73</sup> 16 U.S.C. § 470f.

<sup>74</sup> See 36 C.F.R. part 800.

<sup>75</sup> 36 C.F.R. §§ 800.4(b)(2), 800.6(b)(iv).

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts the construction of the above-described 114-mile Fresno-to-Bakersfield passenger line from the prior approval requirements of 49 U.S.C. § 10901, subject to the following conditions:

- a. The California High-Speed Rail Authority (Authority) may construct the alternative identified as the environmentally preferable alternative by the Federal Railroad Administration (FRA), which consists of portions of the BNSF Alternative in combination with the Corcoran Bypass, Allensworth Bypass and Bakersfield Hybrid alternatives, and two stations: the Kings/Tulare Regional Station-East Alternative and the Bakersfield Station – Hybrid, subject to compliance with all mitigation measures specified in the Mitigation Monitoring and Enforcement Plan imposed by FRA and provided as Appendix C to FRA's Record of Decision, dated June 27, 2014.
- b. The Authority shall comply with the Memorandum of Agreement developed through the Section 106 process of the National Historic Preservation Act.
- c. During project-related construction, the Authority is prohibited from using pile drivers within 300 feet of the south side of Mercy Hospital's existing building located at 2215 Truxtun Avenue, Bakersfield, California.
- d. Prior to initiating construction, the Authority shall ensure that the Construction Management Plan required by FRA's Mitigation Measures LU-AM#2 and SO-AM#1 is expanded to address potential project-related construction impacts to freight railroad operations.

2. All environmental comments submitted to the Board, as well the Authority's replies dated June 17 and June 24, 2014, and its reply to public comments on the transportation merits dated March 27, 2014, are accepted for consideration.

3. Notice will be published in the Federal Register on August 15, 2014.

4. Petitions to reopen must be filed by September 2, 2014.

5. This decision shall be effective on August 27, 2014.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller concurred with a separate expression and Commissioner Begeman dissented with a separate expression.

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VICE CHAIRMAN MILLER, concurring:

In a Protest and Opposition filed March 7, 2014, at 3 n.1, KCWD/CCHSRA suggest that my former employment with Cambridge Systematics should foreclose my participation in this matter. Their argument is not fleshed out, but rather simply asserts that I may not participate because Cambridge Systematics prepared a study used by the Authority to project ridership during the environmental review process conducted by FRA before the Board had become involved.

Under the governing ethical standards, Government officials shall act impartially and shall not give, or appear to give, preferential treatment to any private organization or individual. 5 C.F.R. § 2635.501-.503. It is up to each Board member to assess his or her own impartiality. See Supplemental Standards of Ethical Conduct for Employees of the ICC, 9 I.C.C.2d 838, 840 (1993).

I have consulted with the agency's Designated Agency Ethics Official in this matter, and I have concluded that I am able to act impartially and that it is therefore appropriate for me to participate in this proceeding. I did not work on, nor was I even aware of, the study at issue until I read KCWD/CCHSRA's allusion to it in a footnote in their pleading. Indeed, as I understand it, the study (which, I also understand, was subjected to independent panel review) was prepared between 2005 and 2007, several years before I started working at Cambridge Systematics in 2011. Cambridge Systematics is not a party, nor does it represent a party, in the proceeding before the Board. I have no financial interest in, or continuing relationship with, Cambridge Systematics. But even if I did, I do not know whether, or how, the Board's decision here would affect Cambridge Systematics.

In short, this study has not affected anything I have done in this matter. Under the governing ethical and legal standards, there is no reason why I should not participate fully in this case, and do the job I was appointed to do.

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COMMISSIONER BEGEMAN, dissenting:

Just as I could not support the Board's hasty approval of the Merced-to-Fresno section of this enormous public works project, I cannot support the Board's similar course of action on the Fresno-to-Bakersfield section. Each segment of this project, including its financing, merits the Board's thorough examination, which has not and cannot occur under the exemption process.

Since the California High-Speed Rail Authority (Authority) first came to the Board last year just before it intended to break ground, the majority's primary focus seems to have been getting out of the Authority's way. But doing so here, six weeks after the FRA issued its Record of Decision, could have very serious consequences and needlessly impose service disruptions on a key segment of our nation's freight rail network and its shippers.

Significant portions of the freight rail network have been enduring service challenges since last winter. Addressing existing service problems, and preventing the occurrence of additional operational disruptions, should be foremost on the Board's agenda. Instead, the majority largely ignores the concerns raised by the BNSF Railway Company, which operates a partially double-tracked freight rail line between Fresno and Bakersfield used by more than 40 trains per day. According to BNSF, "[t]he implications of locating the CHSRA line close to BNSF's line are considerable and take a variety of forms, including impacts to BNSF's ability to maintain and use all of its current right-of-way to support freight rail service; its ability to construct spurs to serve current and new industries; electromagnetic interference risks with signals and Positive Train Control Systems (PTC); and height clearance issues[.]"<sup>1</sup>

The Authority and the carrier must reach an agreement to ensure freight service is not jeopardized as a result of this project. Yet, despite discussions between the parties since 2009, "BNSF's questions have not been answered, leaving many uncertainties about construction and operational impacts of the proposed high speed line to BNSF and its customers."<sup>2</sup>

The Board should have required the Authority to resolve its issues with BNSF *before* granting its approval. By doing so, the Board would have ensured a planned, proactive approach to addressing these serious matters and prevented avoidable service disruptions. The majority has instead merely indicated that it expects the Authority and BNSF to work out an arrangement and that in doing so, they may "avail themselves of the Board's processes in the future by (for example) filing a complaint, a petition for declaratory order, a crossing petition under § 10901(d)(1), or by utilizing the Board's alternative dispute resolution procedures." Thus, the Board may eventually end up facing the same issues that time and momentum may make more costly, more disruptive, and less tractable.

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<sup>1</sup> BNSF at 2.

<sup>2</sup> Id.

Among the many other important matters raised by interested parties, the concerns expressed on behalf of Mercy Hospital, which remain largely unaddressed here, warrant attention. The proposed high-speed rail line would be located only 191 feet from the hospital, as the depiction below illustrates. Mercy Hospital representatives argue that “[t]rains moving past the hospital at over 100 miles per hour will create noise, vibrations and disruptions to surgical procedures,”<sup>3</sup> but “[t]he Rail Authority has not conducted the noise and vibration studies they promised to do, nor have they developed any mitigation plans for the impact of the trains on the hospital.”<sup>4</sup> According to Dignity Health, which owns and operates Mercy Hospital, “[i]t appears obvious that the Authority believes it does not need to honor its promises to its stakeholders.”<sup>5</sup>

While the majority’s decision to limit pile driving within 300 feet of the hospital is better than doing nothing, that mitigation effort alone does not fully address the “significant and unique health and safety issues both during and subsequent to construction,”<sup>6</sup> as described by Dignity Health. The Board should have taken action to hold the Authority fully accountable to resolve the significant concerns raised by the hospital before granting its approval. Instead, these and other serious matters are left for others (e.g., the courts) to decide.

I dissent.

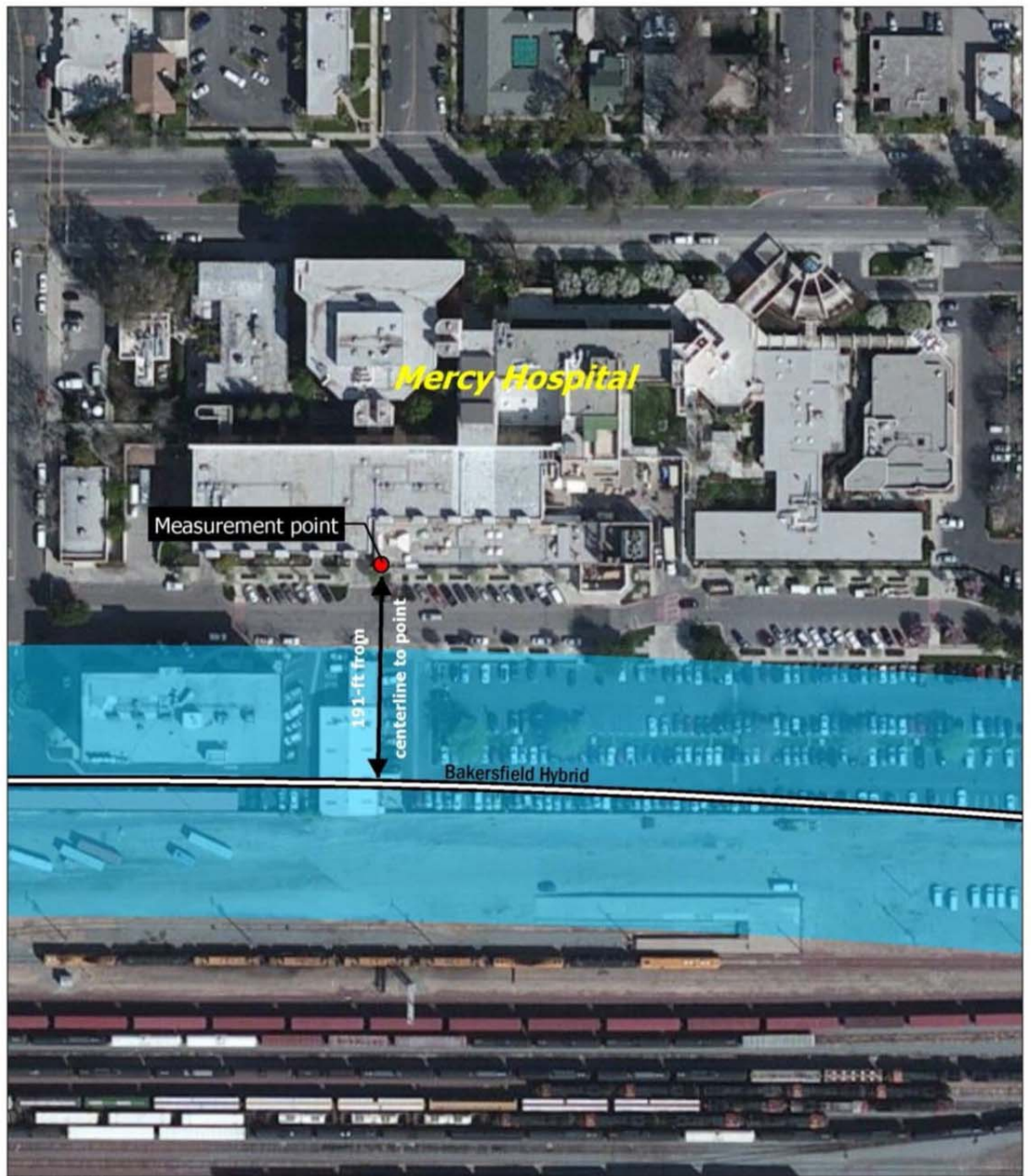
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<sup>3</sup> Dignity Health at Exhibit 7. Dignity Health's filing is available on the Board's website at [www.stb.dot.gov](http://www.stb.dot.gov) (follow the "Environmental Matters" link to the "Environmental Correspondence" link; search for FD\_35724\_1).

<sup>4</sup> Id.

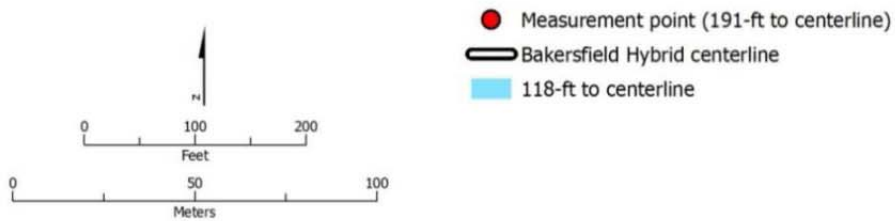
<sup>5</sup> Dignity Health letter, April 2, 2014 at 2.

<sup>6</sup> Id.



Imagery Source: ESRI  
Source: URS/HMM/Arup JV, 2014

June 3, 2014



**APPENDIX**  
**ENVIRONMENTAL MEMORANDUM**



***SURFACE TRANSPORTATION BOARD***  
***Washington, DC 20423***

*Office of Environmental Analysis*

**MEMORANDUM**

TO: Daniel Elliott, Chairman  
Deb Miller, Vice Chairman  
Ann Begeman, Commissioner

CC: Rachel Campbell  
Director, Office of Proceedings

FROM: Victoria Rutson  
Director, Office of Environmental Analysis

DATE: July 11, 2014

SUBJECT: STB Docket No. FD 35724 (Sub-No. 1), California High-Speed Rail Authority – Construction Exemption – in Fresno, Kings, Tulare and Kern Counties, Cal., Review of Environmental Matters

This memorandum summarizes the environmental review process for the California High-Speed Rail Authority's (Authority) proposed construction in the above-mentioned proceeding, sets forth key environmental topics associated with the project, addresses environmental concerns raised during the Board's exemption proceeding, and presents the Office of Environmental Analysis' (OEA) final recommendations to the Board regarding adoption of the Final EIS, the preferred alternative, and environmental mitigation.

**1.0 INTRODUCTION**

By petition for exemption (Petition) filed on September 26, 2013, the Authority seeks authority to construct a high-speed train (HST) rail line between Fresno and Bakersfield, California (Fresno to Bakersfield HST Section).<sup>1</sup> The Fresno to Bakersfield HST Section is the second of nine segments of the planned California HST System (HST System),<sup>2</sup> which would,

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<sup>1</sup> The Authority's Petition is available on the Board's Web site at [www.stb.dot.gov](http://www.stb.dot.gov) (click on "Filings" under "Quick Links," then search by Docket # "FD" and "35724" and "01").

<sup>2</sup> The Board authorized construction of the first segment; i.e., the Merced to Fresno HST Section, on June 13, 2013.

when completed, provide high-speed intercity passenger rail service over more than 800 miles of new rail line throughout California. The HST System would be an electric-powered train system with automated train controls and would operate at up to 220 miles per hour over a fully grade-separated and dedicated rail line. The Fresno to Bakersfield HST Section would include passenger stations in the cities of Fresno and Bakersfield (i.e., this section's termini), a Kings/Tulare Regional Station near Hanford (which would be built when travel demand warrants it), approximately 114 miles of double-tracked mainline, and four tracks at the HST stations (i.e., two through tracks and two station tracks to load and unload passengers).

In a decision issued December 4, 2013, the Board instituted a proceeding under 49 U.S.C. § 10502(b) and extended the deadline for comments on the transportation merits of the proposed construction to December 24, 2013. The Board also denied the Authority's request that the Board conditionally grant the construction authority by addressing the transportation aspects of the proposed project before the environmental review has been completed. Thereafter, the Board extended the comment period on the transportation merits by more than seven additional weeks, to February 14, 2014. Finally, because of the Authority's delay in serving its petition on the parties to the Merced to Fresno HST Section proceeding, as directed by the Board, the comment deadline on the transportation merits was extended another three weeks to March 7, 2014.

The Board also received approximately two dozen comment letters noting environmental concerns in this proceeding, including comments filed by BNSF Railway Company (BNSF) and representatives of Mercy Hospital, to which the Authority responded. Summaries of the major environmental and other concerns expressed by these comments and OEA's responses to the comments and the Authority's replies are provided in Section 4.0 below.

## **2.0 ENVIRONMENTAL REVIEWS**

### **2.1 Environmental Reviews Prior to OEA's Involvement**

Before the Authority filed its Petition and OEA became involved in the environmental review process for the Fresno to Bakersfield HST Section, programmatic and project-specific environmental reviews pertaining to the Fresno to Bakersfield HST Section were conducted jointly by the Authority and the Federal Railroad Administration (FRA). During these reviews, the Authority was the lead state agency for compliance with the California Environmental Quality Act (CEQA), and FRA and the Authority were joint leads for compliance with the National Environmental Policy Act (NEPA). These joint reviews produced single environmental review documents titled "environmental impact reports/environmental impact statements" to meet the obligations of both CEQA and NEPA, respectively. The preparation of single environmental review documents, which cover both Federal and state environmental requirements, is consistent with Council on Environmental Quality (CEQ) regulations at 40 C.F.R. § 1506.2. Because this memorandum pertains to OEA's Federal role in the environmental review process and the Board's consideration of potential environmental impacts under Federal environmental laws, each of these single environmental documents will be referred to as an "EIS."

### 2.1.1 Programmatic EISs

The Authority and FRA began the environmental review process for the California HST System by preparing two programmatic or Tier 1<sup>3</sup> EIS documents to facilitate the selection of preferred alignments and station locations across the proposed system. These selections enabled the Authority and FRA to advance to project-level analyses in Tier 2 EISs. For the California HST System, the Authority and FRA are preparing a project-level EIS for each of the nine proposed HST sections.

In 2005, the Authority and FRA finalized the first Tier 1 document: the Final Program EIS for the Proposed HST System (Final Program EIS).<sup>4</sup> This document provided a programmatic analysis on implementing the HST System across the State, from Sacramento in the north, to San Diego in the south, and the San Francisco Bay Area to the west. The document also enabled the Authority and FRA to select preferred alignments and station locations for most of the California HST System for further analysis in Tier 2 documents.

The Authority and FRA then finalized the second Tier 1 document in 2008: the Bay Area to Central Valley HST Program EIS. However, as a result of two CEQA legal challenges, the document was revised and reissued by the Authority as a Revised Final EIS in 2010 and again as a Partially Revised Final EIS in 2012.<sup>5</sup>

Subsequently, FRA and the Authority issued the Draft and Final Project EISs for the Merced to Fresno HST Section, the first of the nine sections in the HST system. These documents were issued prior to the Board's involvement in the HST system, but the Final Project EIS for the Merced to Fresno HST Section was subsequently adopted by the Board in its June 13, 2013 final decision authorizing construction of the environmentally preferable alternative for that section.

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<sup>3</sup> CEQ's NEPA regulations at 40 C.F.R. § 1502.20 encourage the use of tiering, which is the preparation of an area-wide or program-level EIS (i.e., Tier 1 document) followed by project-specific EISs (i.e., Tier 2 documents). Tiering eliminates repetitive discussions of the same issues and enables Tier 2 documents to incorporate applicable Tier 1 information by reference and to have focused analyses on issues ripe for decision making. CEQA also encourages tiering (14 California Code of Regulations § 15152).

<sup>4</sup> This document is available on the on the Authority's Web site at [http://www.hsr.ca.gov/Programs/Environmental\\_Planning/EIR\\_EIS/Vol1.html](http://www.hsr.ca.gov/Programs/Environmental_Planning/EIR_EIS/Vol1.html).

<sup>5</sup> These documents are available on the Authority's Web site at [http://www.hsr.ca.gov/Programs/Environmental\\_Planning/bay\\_area.html](http://www.hsr.ca.gov/Programs/Environmental_Planning/bay_area.html).

### **2.1.2 Fresno to Bakersfield HST Section – Draft Project EIS**

For the Fresno to Bakersfield HST Section, the second of the nine sections of the HST system, FRA and the Authority were again joint lead agencies for Federal reviews under NEPA, and the Authority was lead agency for state review under CEQA. The U.S. Army Corps of Engineers (USACE) also served as a cooperating agency in the Federal environmental review of the project. The FRA and the Authority issued the Draft Project EIS for the Fresno to Bakersfield HST Section in August 2011 for a 60-day public comment period (FRA ROD, p. 5), and held four public workshops (in Rosedale, Wasco, Corcoran and Fresno, California) and three formal public hearings (in Bakersfield, Hanford, and Fresno, California) on the document (Final Project EIS, pp. S-34 and S-35). The Draft Project EIS considers seven alternatives, including the no-build alternative and six HST build alternatives (Draft Project EIS, p. S-7).<sup>6</sup>

### **2.1.3 Fresno to Bakersfield HST Section – Supplemental Draft Project EIS**

After reviewing the substantive public comments received on the Draft Project EIS, the FRA and the Authority decided to reintroduce alignment alternatives west of Hanford (Hanford West Bypass 1 and 2 alternatives) that would be consistent with the Preferred Alternative identified in the Final Program EIS and another alignment alternative in Bakersfield (the Bakersfield Hybrid Alternative). Because of these additional alternatives, the FRA determined that it was necessary to prepare a Supplemental Draft EIS (Final Project EIS, pp. S-4 and S-5). The FRA and the Authority issued the Supplemental Draft EIS for the Fresno to Bakersfield HST Section in July 2012 for a 90-day public comment period, and held four public workshops (in Rosedale, Wasco, Corcoran and Fresno, California) and three formal public hearings (in Bakersfield, Hanford and Fresno, California) on the document (Final Project EIS, p. S-35; FRA ROD, p. 6). With the three additions, the document considers ten alternatives, including the no-build alternative and nine HST build alternatives (Supplemental Draft Project EIS, pp. S-7 through S-9).<sup>7</sup>

## **2.2 Environmental Review with OEA's Participation**

Following the Board's decision on April 18, 2013 that it has jurisdiction over the proposed 800-mile long California HST system, the Board requested cooperating agency status for the remaining HST project-level EISs on the basis of jurisdiction by law in a May 2, 2013 letter to FRA. By letter dated August 23, 2013, the FRA granted the Board cooperating agency status for the eight project-level EISs currently being prepared or in the planning stages, including the Final Project EIS for the Fresno to Bakersfield HST Section.

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<sup>6</sup> This document is available on the on the Authority's Web site at [http://www.hsr.ca.gov/Programs/Environmental\\_Planning/draft\\_fresno\\_bakersfield.html](http://www.hsr.ca.gov/Programs/Environmental_Planning/draft_fresno_bakersfield.html).

<sup>7</sup> This document is available on the on the Authority's Web site at [http://www.hsr.ca.gov/Programs/Environmental\\_Planning/revised\\_draft\\_fresno\\_bakersfield.html](http://www.hsr.ca.gov/Programs/Environmental_Planning/revised_draft_fresno_bakersfield.html).

### 2.2.1 Fresno to Bakersfield HST Section - Final Project EIS

Upon the Board receiving cooperating agency status, OEA requested and was given a field tour of the proposed Fresno to Bakersfield HST Section by the Authority on September 19 and 20, 2013. The tour included all alternative alignments and alternative station and HMF locations carried forward for detailed analysis in the Final Project EIS. OEA also conducted independent reviews of and commented on the Final Project EIS in draft form. FRA issued the Final Project EIS on April 18, 2014 and the U.S. Environmental Protection Agency (USEPA) published its notice of EIS availability in the Federal Register on April 25, 2014.

The Final Project EIS considers twelve alternatives, including the no-build alternative and 11 HST build alternatives (Final Project EIS, p. S-11). The 11 build alternatives include the nine alternatives evaluated in the Supplemental Draft Project EIS and two slight modifications to the Hanford West Bypass alternatives (i.e., the Hanford West Bypass 1 Modified and Hanford West Bypass 2 Modified). Both additions reflect shifts of up to about 600 feet to avoid two properties protected under Section 4(f) of the Department of Transportation Act (49 U.S.C. § 303).

The Final Project EIS identifies a Preferred Alternative that combines portions of the BNSF Alternative, Corcoran Bypass, Allensworth Bypass, and Bakersfield Hybrid. Regarding stations, the Final Project EIS identifies the Fresno Mariposa Street, Kings/Tulare Regional Station-East, and Bakersfield Station-Hybrid locations as preferred (Final Project EIS, p. 7-1).<sup>8</sup> The BNSF Alternative runs parallel to an existing rail line of BNSF for a significant portion of this alternative's route south of Fresno (thus the "BNSF" moniker). A smaller portion of the BNSF Alternative in Fresno (roughly three miles) also parallels an existing rail line of the Union Pacific Railway Company (Union Pacific) (FRA ROD, p. 14). The Final Project EIS also includes a comprehensive list of proposed mitigation measures (Final Project EIS, pp. S-31 and S-65 through S-92).

The purpose of OEA's reviews was to determine whether the Board could adopt the Final Project EIS under 40 C.F.R. § 1506.3(c), which states that a cooperating agency may adopt, without recirculating, the EIS of a lead agency, when after an independent review of the EIS, the cooperating agency concludes that its comments and suggestions have been satisfied.<sup>9</sup> Based on its review of the Final Project EIS and its initial drafts, OEA concludes that (1) OEA's substantive comments and suggestions on the drafts of the Final EIS have been satisfied; (2) the Final Project EIS adequately assesses the potential environmental impacts associated with the

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<sup>8</sup> The Mariposa Street location was selected for the Fresno station as part of the environmental review for the Merced to Fresno HST Section.

<sup>9</sup> For the Merced to Fresno HST Section, the Board did not have cooperating agency status at the time the Final Project EIS was issued. Thus, after it concluded that the actions covered in the Final Project EIS and the Petition from the Authority to construct the Merced to Fresno HST Section are substantially the same, OEA was required by 40 C.F.R. § 1506.3(b) to recirculate the Final Project EIS.

proposed Fresno to Bakersfield HST Section and meets the standards of CEQ's NEPA regulations and the Board's own environmental regulations at 49 C.F.R. Part 1105; and (3) to satisfy its NEPA obligations, the Board could adopt the Final Project EIS in any decision authorizing the Authority's Petition.

The Board must now decide whether to authorize the Authority's proposed construction, and whether it concurs with OEA's recommendations, including OEA's recommendations regarding Final Project EIS adoption, the preferred alternative, and mitigation.

## **2.2.2 FRA's Record of Decision**

FRA issued its Record of Decision (ROD) for the Fresno to Bakersfield HST Section on June 27, 2014.<sup>10</sup> Based on an analysis of potential project impacts and substantive agency and public comments, FRA approved a Preferred Alternative that includes portions of the BNSF Alternative in combination with the Corcoran Bypass, Allensworth Bypass and Bakersfield Hybrid alternatives. The Preferred Alternative also includes two stations: the Kings/Tulare Regional Station-East Alternative and the Bakersfield Station – Hybrid Alternative.<sup>11</sup> FRA's ROD also directed the Authority to comply with extensive mitigation conditions.

## **2.2.3 Memorandum of Agreement for Historic Review Process**

Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. § 470f) requires Federal agencies to "take into account the effect of" their licensing decisions (in this case, whether to grant the Authority's request for an exemption, also called the "undertaking" under NHPA) on properties included in, or eligible for inclusion in, the National Register of Historic Places (National Register), and prior to the approval of an undertaking, to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. Consultations with the State Historic Preservation Officer (SHPO) are also required. If the undertaking would have an adverse effect on historic properties, the agency must continue to consult to possibly mitigate the adverse effects.

As the lead Federal agency, FRA initiated the Section 106 consultation process for the Fresno to Bakersfield HST Section prior to OEA's involvement. During that process, FRA consulted with the California SHPO, ACHP, federally recognized Tribal organizations and other interested parties. The parties executed a Programmatic Agreement setting out a general process for Section 106 compliance for the entire proposed 800-mile HST System on June 11, 2011. The Section 106 consultation process, as well as evaluations conducted during the NEPA review, identified properties that are included in, or eligible for inclusion in, the National Register that

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<sup>10</sup> FRA's ROD is available on FRA's Web site at <http://www.fra.dot.gov/eLib/details/L05279>.

<sup>11</sup> For Fresno, the Downtown Fresno Mariposa Street Station Alternative was a component of the Preferred Build Alternative approved by the Board in its final decision authorizing construction of the Merced to Fresno HST Section.

would be adversely affected by the Preferred Alternative. Due to access restrictions, surveys for archaeological properties are incomplete; therefore, additional National Register-eligible properties could be present. The regulations implementing Section 106 allow for the development of a Memorandum of Agreement (MOA) when the effects of an undertaking cannot be fully determined prior to approval of an undertaking. When there would be an adverse effect, the MOA can also establish responsibilities for the treatment of historic properties, implementation of mitigation measures, and ongoing consultation efforts. In this case, the FRA, Authority, STB, USACE, SHPO and ACHP executed an MOA on May 14, 2014 that outlines additional surveys, historic property treatment, mitigation measures and other efforts that will take place.<sup>12</sup> Execution of the MOA, its filing with ACHP, and subsequent implementation of its terms, demonstrate and will demonstrate that the FRA, Authority and STB are in compliance with Section 106 (36 C.F.R. § 800.6(c)).

### **3.0 OVERVIEW OF KEY ENVIRONMENTAL TOPICS**

Below, OEA provides an overview of key environmental topics associated with the Fresno to Bakersfield HST Section. Generally speaking, these key topics include (1) resource areas that could experience potentially significant impacts (both adverse and beneficial) from construction and operation of the proposed Fresno to Bakersfield HST Section according to the Final Project EIS and FRA's ROD; (2) topics that were emphasized in public comments summarized in and responded to in the Final Project EIS; or (3) topics that were emphasized in environmental comments (and the Authority's replies) submitted to the Board after it instituted a proceeding in this case.

#### **3.1 Purpose and Need**

In determining a project's purpose and need under NEPA, the Board should consider an applicant's goals in light of the relevant provisions of its enabling statute. The construction of rail lines requires prior Board authorization either through an application filed under 49 U.S.C. § 10901 or, as requested here, by granting an exemption under 49 U.S.C. § 10502 from the application procedures of section 10901. Under 49 U.S.C. § 10502, the Board must exempt a proposed rail construction from the detailed application procedures of 49 U.S.C. § 10901 when it finds that: (1) those procedures are not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power. Under Section 10901(c), the Board must grant rail line construction proposals "unless" the Board finds the proposal "inconsistent with the public convenience and necessity." Thus, Congress has made a presumption that rail construction projects are in the public interest unless shown

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<sup>12</sup> A copy of the MOA is available on the Board's Web site at [http://www.stb.dot.gov/ect1/ecorrespondence.nsf/PublicIncomingByDocketNumber/CF5344A3D804EE9485257CF20045FDA4/\\$File/EI\\_20460.pdf?OpenElement](http://www.stb.dot.gov/ect1/ecorrespondence.nsf/PublicIncomingByDocketNumber/CF5344A3D804EE9485257CF20045FDA4/$File/EI_20460.pdf?OpenElement)

otherwise. Here, we discuss the purpose and need of the Fresno to Bakersfield HST Section as described in the Petition, Final Project EIS, and FRA's ROD, in the context of the Board's enabling statute.

According to the Petition, Final Project EIS, and FRA's ROD, the Fresno to Bakersfield HST Section would be the second of nine sections of the planned California HST System to be constructed. As a component of the planned 800-mile HST System, the purpose of the Fresno to Bakersfield Fresno HST Section is to provide the public with electric-powered, high-speed rail service that provides predictable and consistent travel times between major urban centers with connectivity to airports, mass transit systems, and the highway network in the south San Joaquin Valley, and to connect the northern and southern portions of the HST System (Final Project EIS, pp. 1-5 and 1-6). Once the Fresno to Bakersfield HST Section is constructed (and prior to build-out and operation of the entire HST System), the Authority would make both the Merced to Fresno and Fresno to Bakersfield HST sections available for use by Amtrak's San Joaquin Route (currently operating on nearby BNSF tracks), which could provide improved and faster service for Amtrak's customers (Final Project EIS, p. 2-114). As the Authority currently envisions, this phased-in service scenario could include shifting a portion (but not all) of Amtrak's San Joaquin trains over to the Authority's HST rail line from just south of the Madera Amtrak station to just north of Bakersfield.

FRA's ROD indicates that without the proposed HST System, congestion within the current and future intercity transportation system, including the central part of the San Joaquin Valley, would continue to result in deteriorating air quality, reduced reliability, and increased travel times. The ROD explains that the current transportation system in the San Joaquin Valley region has not kept pace with the increase in population, economic activity, and tourism. The interstate highway system, commercial airports, and conventional passenger rail systems serving the intercity market are operating at or near capacity and would require large public investments for maintenance and expansion to meet existing demand and future growth over the next 25 years or beyond (FRA ROD, p. 12).

The ROD also indicates that the feasibility of expanding many major highways and key airports is uncertain. Some facilities that would require expansion could be impractical or constrained by physical, political and other factors (FRA ROD, p. 12).

### **3.2 Alternatives**

As noted in Section 2.2.1 above, the Final Project EIS considers 11 build alternatives for the Fresno to Bakersfield HST Section including the BNSF Alternative and ten alternative alignments that deviate from the BNSF Alternative for portions of the route (see Figure 1 attached). The BNSF Alternative generally parallels the BNSF rail line corridor from Fresno to Bakersfield. The ten alternative alignments include the Hanford West Bypass 1, Hanford West Bypass 1 Modified, Hanford West Bypass 2, Hanford West Bypass 2 Modified, Corcoran Elevated, Corcoran Bypass, Allensworth Bypass, Wasco-Shafter Bypass, Bakersfield South and Bakersfield Hybrid (Final Project EIS, pp. 2-37 through 2-72).

Regarding HST stations, the Final Project EIS considers two alternative sites for the Kings/Tulare Regional Station (i.e., Kings/Tulare Regional Station – East and Kings/Tulare Regional Station – West) and three alternative sites for the Bakersfield Station (i.e., Bakersfield Station – North, Bakersfield Station – South, and Bakersfield Station Hybrid)(Final Project EIS, pp. 2-72 through 2-87).

Statewide, the HST System would also require one heavy maintenance facility (HMF) to be located somewhere in the Central Valley. The Final Project EIS considers five alternative HMF locations (Final Project EIS, pp. 2-92 through 2-100). Because only one HMF location would be required to support full HST operations, FRA states that it is premature to select an HMF site at this time and that it will decide on an HMF site at later date (FRA ROD, p. 23).

The no project or no-build alternative was also evaluated in the Final Project EIS. This alternative would consist of use of the state's transportation system, both as it is now and as it would be after implementation of programs or projects that are currently projected in regional transportation plans and that are expected to be funded and in place by 2035 (FRA ROD, p. 14).

### **3.3 Overview of Potential Impacts of the Preferred Alternative**

The Preferred Alternative in the Final Project EIS and FRA's ROD consists of portions of the BNSF Alternative in combination with the Corcoran Bypass, Allensworth Bypass and Bakersfield Hybrid alternatives. The Preferred Alternative also includes two stations: the Kings/Tulare Regional Station-East Alternative and the Bakersfield Station – Hybrid Alternative (Final Project EIS, p. 7-1; FRA ROD, pp. 24 through 28). OEA's overview of potential impacts of the Preferred Alternative highlights resource areas that could experience potentially significant impacts and those impacts that were emphasized the most in public comments summarized in and responded to in the Final Project EIS, as well as environmental comments (and replies) received by the Board in this case.

#### **3.3.1 Transportation**

The Preferred Alternative is expected to benefit the regional transportation system by diverting intercity trips from the regional roadway system to high-speed rail. These diverted trips would reduce the overall number of vehicle trips on the regional roadway system, improve future levels of service on roadways, and reduce overall vehicle miles traveled (Final Project EIS, p. 3.2-72). The HST System would also reduce demand and substitute for commercial air travel in California. Approximately 23 percent of passengers at the Fresno and Bakersfield airports would be diverted to HST in the San Joaquin Valley (Final Project EIS, p. 3.2-73). Potential interim use of the Fresno to Bakersfield HST Section by a portion of Amtrak's trains would result in improved and faster service on its San Joaquin Route (operated with conventional speed, diesel trains) (Final Project EIS, p. 2-114).

The Preferred Alternative would be grade-separated at approximately 122 road crossings between Fresno and Bakersfield, which would benefit traffic safety and circulation (Final Project EIS, Appendix 2-A). The proposed grade-separations would occur on average approximately every 2 miles in rural areas but would be more frequent in urban areas (Final Project EIS, p. 3.2-

76). Nevertheless, approximately 53 local roadways would also be permanently closed (Final Project EIS, p. 7-10).

Out of the approximately 122 proposed HST grade separations, approximately 28 would be accomplished in a manner (e.g., passing the road under or over the HST) that would also pass the road under or over existing Union Pacific or BNSF rail lines. In addition, out of the approximately 53 proposed road closures, approximately 11 would occur at existing at-grade crossings of Union Pacific or BNSF rail lines (Final Project EIS, Appendix 2-A). In either case, Union Pacific and BNSF would benefit through reduced risks of grade-crossing collisions and reduced costs for at-grade crossing maintenance, and nearby noise-sensitive receptors would benefit from a reduced frequency in the sounding of locomotive horns at crossings.

Under HST System operation, the Fresno to Bakersfield HST Section would increase traffic congestion at numerous intersections around the three HST stations (Fresno, Kings/Tulare region, and Bakersfield). Mitigation measures imposed by FRA, such as requiring roadway widening, restriping, and installation of traffic signals would address some of these potential adverse impacts (Final Project EIS, p. S-21).

### **3.3.2 Air Quality and Climate Change**

Construction of all the alternatives including the Preferred Alternative would result in substantial emissions of ozone precursors (volatile organic compounds [VOC] and nitrogen oxides [NO<sub>x</sub>]) and carbon monoxide (CO). Without mitigation, project construction would also conflict with regional attainment plans. However, implementation of mitigation imposed by FRA would offset construction-related Clean Air Act criteria pollutant emissions to less than significant levels (Final Project EIS, p. S-22, FRA ROD, p. 28).

Operation of the Preferred Alternative would result in a net benefit to air quality because the HST project would result in lower mobile source air toxics, greenhouse gases, VOCs, NO<sub>x</sub>, CO and particulate matter emissions by diverting trips from transportation modes with higher emissions (i.e., automobile trips and commercial air flights) to high-speed rail, which has lower emissions (Final Project EIS, p. S-22 and S-23; FRA ROD, p. 28).

### **3.3.3 Noise and Vibration**

Construction activities (particularly pile driving) would have the potential to result in building damage from vibrations if the activity occurs within 25 to 50 feet of existing buildings. Mitigation adopted in FRA's ROD, however, would require preconstruction surveys to document the existing conditions of buildings located within 50 feet of proposed pile-driving activities and the use of alternative methods to install piles near buildings that could be damaged by vibration. After mitigation, FRA anticipates that construction vibration impacts would be less than significant (Final Project EIS, p. S-23; FRA ROD, Appendix C, Mitigation Measures N&V-MM#1 through N&V-MM#6).

During operations, the Preferred Alternative is expected to have severe noise impacts on approximately 1,100 noise-sensitive receptors after proposed mitigation is employed (largely

residences, but also a few churches, schools, historic properties and parks) (Final Project EIS, pp. 3.4-28, 3.4-29 and 7-10; FRA ROD, p. 29).

### 3.3.4 Biological Resources and Wetlands

Construction of the Preferred Alternative would not result in significant impacts to federally protected biological resources or wetlands after mitigation required by FRA is implemented (FRA ROD, pp. 29 and 30). Construction would directly impact approximately nine acres of wetlands and 142 acres of other jurisdictional waters of the U.S. protected under the Clean Water Act (CWA)(33 U.S.C. § 1251 *et seq.*)(Final Project EIS, p. 7-9). However, the USACE and USEPA have concurred that the Preferred Alternative likely contains the Least Environmentally Damaging Practical Alternative (FRA ROD, p. 26) and mitigation imposed by FRA and required by the USACE under the CWA would mitigate these potential impacts. The Preferred Alternative would also permanently remove vegetative cover within the construction footprint, including habitat for species that are rare or protected by federal or state law. Operation of the HST System could spread noxious weed species and would bisect existing habitat that has the potential to support special-status species. With mitigation, construction and operation would not likely jeopardize the continued existence of federally listed threatened and endangered species (FRA ROD, p. 41).

FRA-required mitigation includes weed prevention and control; environmental training; delineating environmentally sensitive locations; implementing a biological resources plan; implementing special-status species protection measures; and restoring, enhancing and preserving jurisdictional waters and riparian habitat. These measures and others are expected to reduce operation impacts to negligible (Final Project EIS, pp. S-24 and S-25).

### 3.3.5 Water Resources

The Preferred Alternative would cross approximately 10 water bodies (Final Project EIS, p. 3.8-43) and disturb approximately 7,000 acres of land during construction (Final Project EIS, pp. 3.8-43 and 3.8-45). In-water work would be required for the construction of supporting piers at some of the proposed crossings (Final Project EIS, p. 3.8-44). Construction activities could alter existing drainage patterns, redirect stormwater runoff, lead to erosion and sedimentation, result in water quality degradation, and impede or redirect flood flows (Final Project EIS, pp. 3.8-44 through 3.8-50).

Potential water quality impacts of construction would be minimized through compliance with a CWA Section 404 permit, compliance with FRA-imposed mitigation measures, and implementation of appropriate best management practices (BMPs). The crossings would be designed to maintain existing hydraulic capacity and connectivity and comply with a Rivers and Harbors Act Section 408 (33 U.S.C. § 408) permit; therefore, any potential impacts on hydrology and floodplains would not be significant (FRA ROD, pp. 9, 10 and 31).

The Preferred Alternative would convert lands that depend heavily on groundwater (i.e., irrigation-sustained agricultural) to a transportation-based land use that would consume

substantially less water. Therefore, the Preferred Alternative would result in a beneficial effect to groundwater supplies in the region (FRA ROD, p. 31).

### **3.3.6 Residential, Business and Other Displacements**

The Preferred Alternative would require the displacement of approximately 405 housing units, 396 businesses, and three religious facilities, and result in the division of several communities (e.g., Ponderosa Road east of Hanford, Newark Avenue northeast of Corcoran, 5<sup>th</sup> Avenue and Waukena Avenue east of Corcoran, and the community of Chrome between Shafter and Bakersfield)(Final Project EIS, p. 7-10).

The Authority must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended (42 U.S.C. Chapter 61)(Uniform Act). The provisions of the Uniform Act, a federally mandated program, would apply to all acquisitions of real property or displacements of persons resulting from this federally assisted project (i.e., funded in part through FRA's grants). The Uniform Act was created to provide for and ensure fair and equitable treatment of all affected persons. Additionally, the Fifth Amendment of the United States Constitution provides that private property may not be taken for a public use without payment of "just compensation." The Uniform Act requires that the owning agency provide notification to all affected property owners of the agency's intent to acquire an interest in their property. This notification includes a written offer letter of just compensation. A right-of-way specialist is assigned to each property owner to assist him or her through the acquisition process. The Uniform Act also provides benefits to displaced individuals to assist them financially and with advisory services related to relocating their residence or business operation. Benefits are available to both owner occupants and tenants of either residential or business properties (Final Project EIS, pp. 3.12-135 and 3.12-136).

### **3.3.7 Agricultural Lands**

The Preferred Alternative would result in the permanent conversion of agricultural land to nonagricultural uses; severance of large agricultural properties; displacement and disruption of irrigation systems including wells, pumps and water distribution systems; and conflicts with farmland protection contracts (Final Project EIS, pp. 3.14-34 through 3.14-47). Approximately 3,472 acres of important farmland, including 1,747 acres of Prime Farmland (designated under the Farmland Protection Policy Act, 7 U.S.C. §§ 4201 *et seq*), would be converted to nonagricultural use (Final Project EIS, p. 7-10). These conversions to nonagricultural uses include severed parcels that would no longer be economically viable to farm because of size and overly complex farming logistics (e.g., access difficulties, loss of connectivity to irrigation systems, aerial spraying complications, etc.) (Final Project EIS, p. 7-10, pp. 3.14-46 through 3.14-60).

Mitigation measures required by FRA would preserve land for agriculture and consolidate remnant parcels so that they can remain in agricultural production. The Authority would be required to enter into a contract with the California Department of Conservation to provide agricultural land mitigation services including the establishment of permanent conservation easements on land of similar acreage, location, and quantity to that which would be

affected by the HST rail line. These measures would prevent future losses of currently unprotected farmland, but would not create new farmland or replace the converted farmland. Therefore, even with the mitigation, the farmland loss that would result from construction of the Preferred Alternative is considered significant (FRA ROD, p. 32).

### 3.3.8 Parks and Recreation

The Preferred Alternative would impact four recreational areas in Bakersfield: McMurtrey Aquatic Center, Kern River Parkway, Mill Creek Linear Park, and the Amtrak Station playground (FRA ROD, pp. 32 and 33). Project-related construction activities would occur within 100 feet of the Bakersfield's McMurtrey Aquatic Center, and the facility would be exposed to increased noise levels during these activities (Final Project EIS, p. 3.15-36). Because the tracks for the Fresno to Bakersfield HST Section through much of Bakersfield would be placed on a newly constructed viaduct or guideway, the construction and placement of columns supporting the guideway would also result in potential impacts. Noise increases from HST operations would be negligible at the aquatic center because of noise barriers that would be constructed on the guideway (Final Project EIS, p. 4-37).

An existing parking lot used by McMurtrey Aquatic Center visitors would be directly affected by the Preferred Alternative; approximately 423 of 660 parking spaces (64.1 percent) would be removed. However, the Authority would ensure that removed parking is replaced. Parking replacement would be achieved through the utilization of existing vacant lots within proximity to the facility or dedicated shared use of parking spaces constructed as part of the Bakersfield Station (Final Project EIS, p. 3.2-104).

The Kern River Parkway and Mill Creek Linear Park are linear recreational facilities that parallel natural water courses. Existing paths in the parks are used by bikers, pedestrians and others (Final Project EIS, pp. 3.15-14 and 3.15-15). Both facilities would be crossed by the Preferred Alternative via an elevated guideway. Although the guideway would span the parks (including existing bike paths) with a clearance of approximately 65 feet for the Kern River Parkway and 30 feet for the Mill Creek Linear Park, construction of the guideway would require the placement of support columns in each park (Final Project EIS p. 3.15-40; Final Project EIS, Volume III, Section G, Part 2). For safety reasons, column and guideway construction activities would require the closure of a portion of each park for several months. However, temporary detours would be established to maintain connectivity to the unaffected portions of the linear park and typical recreational activities would resume at the conclusion of this construction period (Final Project EIS, p. 3.15-36). The guideways would represent an additional visual intrusive element, but generally would be consistent with the existing urban settings of both parks. For the Kern River Parkway the setting includes existing roadway bridges, and for Mill Creek Linear Park the setting includes at-grade roadway crossings and the BNSF right-of-way. Operation of the Fresno to Bakersfield HST Section would also result in minor increases in noise levels in the parks (Final Project EIS, pp. 3.15-38, 3.15-46 and 3.15-50).

The Bakersfield Amtrak Station playground would be separated from the Preferred Alternative by the existing BNSF and Amtrak rights-of-way. However, construction of the Preferred Alternative would temporarily increase noise exposure to playground users, and once

constructed, the HST guideway would degrade the visual character and quality of the playground. However, given the urban setting of the playground, potential impacts are not expected to be significant (Final Project EIS, pp. 3.15-32, 3.15-44 and 3.15-51)

### **3.3.9 Aesthetics and Visual Resources**

The Preferred Alternative would permanently lower the visual quality in both rural and urban areas because of the construction of elevated grade-separated crossings, elevated guideways and sound barriers along the guideway. In rural areas, construction of these structures would require the removal of orchards and fields and the structures would block views and degrade the visual quality beyond the infrastructure of the HST System (Final Project EIS, pp. 3.16-67 through 3.16-146). In urban areas where extensive road networks must be maintained, an elevated guideway would be necessary to ensure that a fully grade-separated HST system is constructed (Final Project EIS, pp. 2-10 through 2-12). The potential visual impacts of the elevated guideways would be particularly evident in the urban core of Bakersfield (from approximately Palm Avenue to Oswell Street) where the elevated guideway would range from roughly 40 feet to 80 feet in height through the City (Final Project EIS, Vol. III, Section G, HST Structure Plans, Part 2 of 2, File 5). Although mitigation measures such as the planting of trees and other vegetation would be required of the Authority as a result of mitigation imposed in FRA's ROD, potential visual impacts would remain significant (Final Project EIS, p. S-30; FRA ROD, p. 33).

### **3.3.10 Socioeconomics and Environmental Justice**

Construction of the Preferred Alternative would displace approximately 396 commercial and industrial businesses and approximately 405 housing units (Final Project EIS, p. 7-10). Approximately 136 agricultural parcels would be split by the Preferred Alternative (Final Project EIS, p. 3.12-94). HST construction activities could lower sales prices of nearby properties and result in lower property tax revenues. Overall however, HST construction would temporarily benefit the regional economy through construction spending, job creation, and increased sales tax revenue (Final Project EIS, p. 3.12-142).

Operation of the Fresno to Bakersfield HST Section would provide economic benefits and facilitate broader economic expansion for the entire region. These economic advantages include user benefits (travel-time savings, cost reductions, reduced accidents) and accessibility improvements for the region's citizens through improved connection of the Central Valley to the rest of California (Final Project EIS, p. 3.12-96). Some agricultural production would be lost but compensation for that loss would be a component of the compensation paid to landowners during the land acquisition process. Compensation also would reflect the value of any existing assets (such as the fruiting trees within an orchard) that have a future value for production. However, it would likely be difficult to relocate some agricultural production areas after compensation. Additionally, some relocated agricultural production would take time to re-establish itself and return to full production levels (Final Project EIS, p. 3.12-101).

Construction and operation of the Preferred Alternative would result in disproportionately high and adverse effects on minority and low-income populations. These populations are located

in Fresno, Wasco, Shafter, Bakersfield and some rural areas such as Newark Avenue, 5<sup>th</sup> Avenue and Waukena Avenue in Corcoran, and the community of Chrome south of Shafter. Where mitigation measures imposed by FRA would not completely reduce the impacts in areas with minority and low-income populations, disproportionately high and adverse effects on minority and low-income populations would occur. Noise and vibration, community division and/or disruption, land use, parks and recreation, visual, and cumulative impacts would have disproportionately high and adverse effects on minority and low-income populations and FRA has adopted measures to mitigate but not eliminate these potential impacts (Final Project EIS, pp. 3.12-133 and 3.12-134; FRA ROD, pp. 31, 32, 42 and 43).

FRA also considered the potential offsetting benefits of the Fresno to Bakersfield HST Section to the environmental justice communities (FRA ROD, pp. 42 and 43). For example, FRA, the Authority and three other federal agencies have formed an Interagency Partnership and executed a “Memorandum of Understanding for Achieving an Environmentally Sustainable High-Speed Train System in California.” Several of the partnership’s principles would benefit minority and low-income populations including improving access to affordable housing, increasing transportation options, lowering transportation costs, and protecting the environment. The Authority states that it would also continue its outreach activities, such as workshops that have been held in Fresno, to discuss the HST System, collect community input, and provide literature on relocation assistance programs and property rights (Final Project EIS, p. 3.12-134).

To ensure that project-related job opportunities benefit minority and low-income populations, the Authority states it would develop a community benefits policy to support employment of individuals who reside in disadvantaged areas and those designated as disadvantaged workers. This would help to remove potential barriers to small businesses, disadvantaged business enterprises, disabled veteran business enterprises, women-owned businesses, and microbusinesses that want to participate in building the HST System (Final Project EIS, p. 3.12-134).

### **3.3.11 Cultural and Paleontological Resources**

Construction of the Preferred Alternative would not affect any known archaeological resources that are considered eligible for the National Register (Final Project EIS, p. 3.17-101). However, due to access restrictions, surveys for archaeological resources are incomplete and unknown/unrecorded archaeological resources could exist along the Preferred Alternative. Disturbance or removal of these unknown resources during construction could result in adverse effects under Section 106 (Final Project EIS, p. 3.17-103). Project operations would not result in effects on archaeological resources (Final Project EIS, p. 3.17-127).

Construction of the Preferred Alternative would not affect any known paleontological resources. However, geologic formations that are intersected by the Fresno to Bakersfield HST Section are considered highly sensitive for potentially significant, yet unidentified, paleontological resources (Final Project EIS, p. 3.17-102).

Construction of the Preferred Alternative would cause an adverse effect on five historic properties including the South Van Ness Entrance Gate (City of Fresno), Washington Irrigated

Colony Rural Historic Landscape (Fresno County), Peoples Ditch (Kings County), Lakeside Cemetery (Kings County), and Stark/Spencer Residence (City of Bakersfield) (MOA, p. 2).

As discussed in Section 2.2.2 above, the PA establishes the framework for the development and implementation of measures to avoid, minimize and mitigate adverse effects on historic properties including archaeological and architectural resources. In compliance with the PA, the Signatories developed mitigation measures for treatment of adverse effects that cannot be avoided, and the MOA for the Fresno to Bakersfield HST Section details the commitments that have been made to implementing these treatments. For archaeological resources, measures in the MOA include completing the inventory, evaluating National Register eligibility, and determining whether preservation in place or data recovery is appropriate. For architectural resources, measures include condition assessments, vibration monitoring, and moving, shoring, stabilizing, monitoring, rehabilitating or restoring buildings (Final Project EIS, p. 3.17-128).

Mitigation measures for potential impacts to paleontological resources include requiring the Authority to retain a paleontological resources specialist, prepare and implement a paleontological resource monitoring and mitigation plan, and halt construction if fossil or fossil-bearing deposits are encountered. These measures are expected to reduce potential cultural and paleontological impacts to negligible levels (Final Project EIS, pp. 3.17-136 and 3.17-138).

### **3.3.12 Cumulative Impacts**

The Preferred Alternative could result in cumulative impacts when considered together with other past, present, and reasonably foreseeable future projects. The Final Project EIS evaluates cumulative impacts for each resource area considered in the Final Project EIS and defines a study area for the potential cumulative effects for each resource area. The Final Project EIS defines reasonably foreseeable future projects as those likely to occur within the Authority's 2035 planning horizon for the HST System including: projects that are a foreseeable future phase of an existing project; construction projects pending with a government agency; and projects included in regional transportation plans, local land use plans, agency budgets, and agency capital improvement programs (Final Project EIS, p. 3.19-2).

According to the Final Project EIS, potential cumulative impacts would be significant in the following areas: noise and vibration during construction and operation of the Fresno to Bakersfield HST Section (Final Project EIS, pp. 3.19-16 and 3.19-17); division or disruption of communities during HST System construction and operation (Final Project EIS, p. 3.19-36); environmental justice during HST System construction and operation (Final Project EIS, p. 3.19-37); land use during HST System operation (Final Project EIS, pp. 3.19-40 and 3.19-41); agriculture during HST System operation (Final Project EIS, pp. 3.19-42 and 3.19-43); aesthetics and visual quality during HST System construction and operation (Final Project EIS, pp. 3.19-47 and 3.19-48); and cultural resources during HST System construction and operation (Final Project EIS, pp. 3.19-49 and 3.19-50). Compared with the no-action alternative, the Preferred Alternative would be beneficial to regional transit during HST System operations (Final Project EIS, p. 3.19-9); air quality and global climate change during HST System operations (Final Project EIS, pp. 3.19-13 and 3.19-14); and economic development during construction and operation of the HST System (Final Project EIS, p. 3.19-37).

#### **4.0 SUMMARY OF ENVIRONMENTAL COMMENTS RECEIVED BY THE SURFACE TRANSPORTATION BOARD**

In its decision served December 4, 2013 instituting a proceeding in this case, the Board specifically notes that replies to the Petition should address the transportation merits of the case, and that the Board was not soliciting additional comments on environmental matters because the public comment periods on the Draft Project EIS and Supplemental Draft Project EIS had already closed. Nevertheless, in response to the Board's December 4, 2013 decision, as well as issuance of the Final Project EIS on April 18, 2014, OEA received approximately two dozen comment letters raising environmental concerns. The letters were submitted by individuals, local governments, local institutions, a citizen's organization, farming interests, a local hospital, and a freight railroad. The Board also received replies from the Authority for comment letters received by the Board from BNSF and attorneys representing Dignity Health, the owner of Mercy Hospital in Bakersfield.<sup>13</sup> Summaries of the specific and substantive environmental issues raised in the comments received, the replies, and OEA's responses to the comments and replies, are provided below. Many of the environmental comments received by the Board are the same or similar to comments that were also submitted on the Draft Project EIS and Supplemental Draft Project EIS, and OEA believes that FRA and the Authority responded to those comments thoroughly and appropriately in the Final Project EIS (Volumes IV and V), and that no need has been shown here for the preparation of additional environmental documentation.<sup>14</sup>

#### **4.1 Alternatives Carried Forward**

Several commenters, including the Kings County Farm Bureau and Carol Bender, state that FRA and the Authority failed to give primary consideration to potential HST System alignments that use existing transportation corridors. The commenters state that the alternatives studied in the Final Project EIS deviate from existing transportation corridors (i.e., Interstate 5 (I-5) and State Route 99 (SR 99)) and the I-5 and SR 99 corridors should have been carried forward as build alternatives in the project EISs. Commenters also state that tunneling or trenching through Hanford should have been given more consideration.

These and similar comments on alternatives were submitted on the Draft Project EIS and Supplemental Draft Project EIS and were responded to by FRA and the Authority (Final Project

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<sup>13</sup> These comments and replies are available on the Board's Web site ([www.stb.dot.gov](http://www.stb.dot.gov)) at either of two locations: (1) from the Board's home page, click on "Filings" under "Quick Links," then search by Docket # "FD" and "35724" and "01"; and (2) from the Board's home page, place your cursor over "Environmental Matters," select "Environmental Correspondence" from the dropdown menu, select "Incoming by Docket Number," select "Next Page," toggle down until finding "FD\_35724\_1," and finally click on the blue arrow to open the list of environmental correspondence received at the Board.

<sup>14</sup> BNSF did not provide written comments on either the Draft Project EIS or Supplemental Draft Project EIS.

EIS, pp. 2-20 and 2-21). OEA concurs with these responses, and concludes that the approach used to select alternatives was reasonable and that there is no need to supplement the project EIS. For example, in the Final Project EIS, FRA and the Authority explain that while the alternatives analysis considered multiple criteria, the screening emphasized the use of existing transportation corridors and available rights-of-way (Final Project EIS, pp. 16-8 through 16-24). Accordingly, contrary to the commenter's claims, three build alternatives in the Final Project EIS do in fact follow existing freight transportation corridors of BNSF, to the extent feasible.

FRA and the Authority also explain that the I-5 and SR 99 alignments were carefully considered and reasonably rejected for further study in the 2005 Final Program EIS. Although the I-5 corridor could possibly provide better travel times in some cases, the agencies ultimately concluded that it would not satisfy the project's purpose and need (Final Project EIS, pp. 16-12 through 16-16). For example, the Final Project EIS explains that the I-5 corridor is geographically removed from where the bulk of the Central Valley population resides, and that a HST rail line parallel to I-5 would result in lower ridership, fail to meet current and future intercity travel demands of the Central Valley communities, and fail to maximize intermodal transportation opportunities. The Final Project EIS also properly concludes that use of the I-5 corridor would encourage sprawl development, which is the opposite of what the HST System is intended to achieve. Regarding SR 99, the Final Project EIS reasonably concludes that a SR 99 alignment would not be feasible or practicable because of direct and indirect impacts on numerous industrial facilities, conflicts with airport runway protection zones, the need to reconstruct four interchanges along SR 99 that would not comply with current California Department of Transportation (Caltrans) design standards, and conflicts with existing Union Pacific infrastructure and right-of-way (Final Project EIS, pp. 16-17 and 16-20). OEA concurs that, in these circumstances, it was reasonable to eliminate the I-5 and SR 99 alignments and there is no need to supplement the Final Project EIS to give more consideration of those alignments.

Regarding an alternative through Hanford, the Final Project EIS reasonably explains why two "through-town" alternatives were not carried forward for additional analysis (Final Project EIS, p. 16-9). Although the alternatives through Hanford could reduce the conversion of important farmland from 730 acres down to 382 acres, the Final Project EIS shows that they would result in substantial urban impacts. Those impacts include the displacement of an additional 27 to 37 residential parcels, 14 to 21 commercial parcels, 21 to 23 industrial parcels, 20 to 24 public parcels, 2 churches, and 2 public parks (Final Project EIS, p. 16-10). The alternatives would displace many residences near the BNSF rail line between W. Grangeville Boulevard and W. Elm Street in Hanford, and displace many of the businesses in downtown Hanford between 11th Avenue and the BNSF Railway south to SR 198. The alternatives through Hanford would also go through the center of the community of Laton in Fresno County (Final Project EIS, p. 16-10). Because of these greater impacts, OEA concurs with FRA that it was reasonable to discard the "through-town" alternatives.

## 4.2 Potential Project Impacts

### 4.2.1 General Concerns

Karen Stout states that the concepts of Tier 1 and Tier 2 documents are confusing and not adequately explained in the EISs. In response, OEA notes that the purpose of NEPA is assist public officials in making more informed and better decisions by providing them with an understanding of the potential environmental impacts of a proposed project (40 C.F.R. § 1500.1). For large and complex projects, such as the proposed HST System, tiering assists agencies in adequately identifying, evaluating and disclosing a project's potential environmental impacts. The first tier (or Tier 1) document addresses the broader environmental impacts of the proposed project as a whole (e.g., the statewide assessment of the proposed HST System) and the second tier (or Tier 2) documents focus on the environmental impacts of narrower topics or smaller components of the larger project (e.g., one Tier 2 document for each of the nine sections of the proposed HST System). OEA believes that the tiering concept and its application to the HST System have been adequately explained in the EIS documents prepared by FRA and the Authority including the Final Program EIS (pp. 1-2 through 1-4), Bay Area to Central Valley HST Final Program EIS (pp. 1-2 through 1-4), and the Fresno to Bakersfield HST Section Final Project EIS (pp. 1-1 through 1-3; and 16-1 through 16-7).

### 4.2.2 Agriculture

Several commenters, including William Descary, Ross Browning and the City of Bakersfield, raise concerns that the proposed Fresno to Bakersfield HST Section would disrupt farming activities during construction and would permanently divide family farms, make the farms inefficient and costly to operate, and result in lost future income from displaced orchards. Commenters also state that the proposed HST rail line would destroy capital investments in irrigation wells, weirs, piping and other irrigation system components.

The Final Project EIS acknowledges that the Fresno to Bakersfield HST Section would adversely affect individual farms and other agricultural operations. For example, the Final Project EIS acknowledges that construction of the HST System would result in disruption to or removal of existing infrastructure such as buildings, pumps and wells, reservoirs and ponds, irrigation systems, power supplies and access (Final Project EIS, pp. 3.12-92 through 3.12-96; 3.12-101 through 3.12-106; 3.14-42 through 3.14-60; 16-31; 16-56 and 16-57). OEA believes that FRA and the Authority have taken a hard look at the potential impacts to agriculture and appropriately disclosed those impacts in the project EISs.

Moreover, FRA and the Authority have incorporated special features into the project's design and FRA has imposed mitigation to reduce impacts to agriculture. For example, one of the project's design requirements specifies that important farmland used temporarily for construction staging be returned to as close to its pre-construction condition as possible with a goal of ensuring that each important farmland parcel remains available for long-term agriculture (Final Project EIS, pp. 3.14-60 and 3.14-61). As another design feature, the Authority would purchase at fair market value all farm parcels directly affected by the HST right-of-way, as well

as severed agricultural parcels that could no longer be economically farmed by the current owner. The Authority also would attempt to consolidate severed agricultural parcels by selling them to new and adjacent farmland owners (Final Project EIS, pp. 3.14-51; 16-57; 16-122; 16-147 and 148; 16-150 and 151). As the Final Project EIS explains, potential impacts to on-farm infrastructure would be analyzed on a case-by-case basis during the property appraisal process. Irrigation systems would also be permitted to cross the HST right-of-way if the crossing meets specific HST design standards. Individual negotiations with farmers during the right-of-way acquisition process would attempt to resolve redesign and productivity issues, as well as appropriate reimbursement (Final Project EIS, p. 3.12-9; 16-152). Regarding mitigation, the Authority would provide access modifications to affected farmland and participate in the California Farmland Conservancy Program (Final Project EIS, pp. 3.12-140; 3.14-62; FRA ROD, Appendix C, Mitigation Measures AG-MM#1 and AG-AM#1 through AG-AM#4). OEA believes that design features adopted by FRA and the Authority, and the mitigation measures imposed by FRA are reasonable and feasible and would minimize, to the extent practicable, adverse impacts on agriculture.

#### **4.2.3 Air Quality**

Several commenters, including Kings County, Karen Stout and Rochelle Andranigian, contend that regional air quality would get worse before it gets better with the Fresno to Bakersfield HST Section. One commenter notes that FRA and the Board cannot approve the Fresno to Bakersfield HST Section unless and until a Voluntary Emission Reduction Agreement (VERA) with the San Joaquin Valley Air Pollution Control District (SJVAPCD) is completed. The Final Project EIS, however, took these concerns into account.

The Final Project EIS and FRA's ROD acknowledge that construction of the Fresno to Bakersfield HST Section would result in temporary air quality impacts and that emissions of VOC and NO<sub>x</sub> could cause or contribute substantially to violations of air quality standards in the San Joaquin Valley Air Basin (SJVAB) (Final Project EIS, pp. 3.3-46 through 3.3-51; FRA ROD, p. 28). However, the Authority has proposed and the FRA has imposed mitigation that would offset these impacts (Final Project EIS, p. 3.3-88 and 16-55; FRA ROD, Appendix C, Mitigation Measures AQ-MM#1 through AQ-MM#5 and AQ-AM#1 through AQ-AM#4). The Authority would provide funds to the SJVAPCD's Emission Reduction Incentive Program, which in turn would fund grants for projects that achieve emission reductions thus, offsetting impacts on air quality related to the Preferred Alternative. The purchase of these offset emissions through a VERA would reduce construction emission impacts to less than significant.

Accordingly, in its ROD, FRA reasonably concludes that project-generated emissions would either be fully offset (for construction phase) or less than zero (for the operational phase). The ROD also concludes that the Fresno to Bakersfield HST Section conforms to California's State Implementation Plan for air quality and would comply with national ambient air quality standards (FRA ROD, p. 40).

#### 4.2.4 Noise and Vibration

William Descary and Ross Browning state that noise from HST operations would adversely impact quality of life and that mitigation proposed in the Final Project EIS is insufficient. Regarding quality of life and noise mitigation, OEA notes that the Final Project EIS and FRA's ROD conclude that mitigation would reduce most potential noise impacts of the project to less than significant levels. However, even with mitigation, including the use of sound barriers, a substantial number of receivers would still be exposed to significant noise impacts because the receivers are located outside of the area where a sound barrier would be fully effective or a sound barrier cannot fully mitigate the effect (Final Project EIS, pp. 3.4-28, 3.4-29 and 7-10; FRA ROD, p. 29).

Attorneys for Dignity Health, owner of Mercy Hospital in Bakersfield (Mercy Hospital), also assert that the noise and vibration analyses in the Final Project EIS are inadequate. For example, Mercy Hospital states that the (1) ambient noise monitoring location near the hospital was inappropriate; (2) methodologies used for noise and vibration calculations were inappropriate; (3) noise and vibration mitigation is lacking; and (4) pile driving activities during project-related construction would adversely impact Mercy Hospital.

The Authority's point-by-point response explains that (1) the selected ambient noise monitoring location best characterizes ambient noise conditions on the south side of Mercy Hospital, which is the side facing the Preferred Alternative; (2) noise and vibration calculations in the project EISs are consistent with FRA and Federal Transit Administration guidance and methodologies; (3) mitigation recommended in the Final Project EIS would minimize any noise and vibration impacts to Mercy Hospital; and (4) drilling and casing would be used to install piles instead of pile driving where necessary to reduce noise and vibration impacts (OEA note: see FRA ROD, Appendix C, Mitigation Measure N&V-MM#1).

Based on its review of the Final Project EIS, comments on the Final Project EIS, the Authority's reply to Mercy Hospital's comments on the Final Project EIS, and the discussion and mitigation in FRA's ROD, OEA concludes that the Final Project EIS took the requisite hard look at the potential noise and vibration impacts of the Preferred Alternative. Therefore, OEA sees no need to supplement the noise and vibration analysis in the Final Project EIS. Additionally, although significant noise impacts would remain after FRA-imposed noise mitigation is implemented, OEA concludes that, with the exception of mitigation for Mercy Hospital (see discussion below), the mitigation proposed in the Final Project EIS and imposed by the FRA in its ROD is reasonable and appropriate. Indeed, the design features and mitigation required by FRA (particularly the use of grade-separated crossings and noise barriers, respectively) go far beyond what the Board would typically impose for potential noise and vibration impacts in a rail construction case.

OEA, however, is concerned about the potential effects of noise and vibration that could result from the potential use of pile driving in the vicinity of Mercy Hospital during project-related construction. In its reply to Mercy Hospital's comment raising noise and vibration concerns, the Authority acknowledges that, based on a worst-case estimate presented in the Final

Project EIS (pp. 3.4-31 through 3.4-33), Mercy Hospital could experience impacts if pile driving is used, but explains that the need for pile driving during project-related construction has not been determined. The Authority's reply also points out that Mitigation Measure N&V-MM#1 in the Final Project EIS (p. 3.4-56), which FRA also imposed in its ROD (FRA ROD, Appendix C, Mitigation Measure N&V-MM#1), would be implemented if pile driving is determined necessary in the vicinity of Mercy Hospital. Specifically, mitigation measure N&V-MM#1 provides that: ". . . to mitigate noise related to pile driving, the use of an auger to install the piles instead of a pile driver would reduce noise levels substantially. If pile driving is necessary, limit the time of day that the activity can occur." OEA, however, is concerned that the mitigation measure does not specifically require the substitution of pile driving with augering and leaves open the possibility that nighttime restrictions for pile driving could be used rather than substituting augering for drilling. Nighttime restrictions, OEA believes, would not adequately mitigate the potential project-related construction impacts to Mercy Hospital. Mitigation Measure N&V-MM#2 in FRA's ROD merely identifies augering as a potential alternative to pile driving if construction is within 25 to 50 feet of a building (FRA ROD, Appendix C, Mitigation Measure N&V-MM#2). Moreover, Mercy Hospital would be about 191 feet from the centerline of the Preferred Alternative (Authority Reply, Figure 1) and Mitigation Measure N&V-MM#2 does not appear to apply to Mercy Hospital.

Given Mercy Hospital's concerns, the potential for Mercy Hospital to be adversely impacted by project-generated noise and vibration during construction, and the Authority's uncertainty as to whether pile driving would be used in the vicinity of Mercy Hospital, OEA recommends that an additional mitigation measure be imposed by the Board in any decision granting construction authority to further minimize project-related construction noise and vibration impacts on the hospital. That measure would prohibit the Authority's use of pile driving within 300 feet of Mercy Hospital during project-related construction.<sup>15</sup>

#### **4.2.5 Other Rail Operations**

Environmental comments pertaining to potential impacts to Amtrak and freight railroad operations are addressed below.

#### **Amtrak Operations**

Several commenters, including the City of Bakersfield, Kings County Water District, Citizens for California High-Speed Rail Accountability, Anil Mehta, and Joyce Cody, raise concerns related to the Authority's plans to move the San Joaquin Amtrak service over to the

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<sup>15</sup> Vibration is described in terms of vibration decibels (VdB) with 72 VdB being an FRA ground-borne vibration impact criterion for residences and other buildings where people sleep (Final Project EIS, p. 3.4-11). The Authority calculates that the vibration level of 72 VdB would occur at a distance of 291 feet from a typical pile driver (Authority Reply, p. 7). OEA rounded the 291 feet distance up to 300 feet in developing its recommended mitigation measure.

Fresno to Bakersfield HST Section.<sup>16</sup> Some commenters contend that the analysis of Amtrak operations in the Final Project EIS is inadequate or incomplete. Other commenters note that the Authority has no jurisdiction over Amtrak and any relocation to the HST rail line would be Amtrak's decision, not the Authority's. Some commenters add that the HST rail line would not be suitable for Amtrak service and that the Authority has not made any provisions for Amtrak service on the HST rail line (e.g., interim stations and platforms). Other commenters object to losing Amtrak service to certain stations (including one in Hanford) on the existing BNSF route and the subsequent difficulties they would experience in having to go further to access Amtrak train service.

In its reply to BNSF's comments filed with the Board, the Authority explains that the potential use of the HST tracks by Amtrak's San Joaquin passenger service is not a part of the Authority's proposed project, and that any Amtrak passenger service over the HST tracks would be the purview of the San Joaquin Railroads Joint Power Authority, not the Authority. To accommodate Amtrak service, the Authority notes that crossover tracks would need to be constructed just south of the Madera Amtrak station and north of Bakersfield. The Authority also notes that Appendix 2-F of the Final Project EIS describes the potential interim use scenario and analyzes the potential impacts of interim use. The Authority's analysis assumes that five of the six existing daily roundtrip San Joaquin trains would make the shift to provide the interim service.

The Final Project EIS further explains that the Authority's Revised 2012 Business Plan and the FRA grant agreements with the Authority identify a potential interim use service option that could provide early service benefits to the traveling public by allowing for Amtrak San Joaquin intercity operation using HST infrastructure on an interim basis if HST service is delayed (Final Project EIS, Appendix 2-F, p. 2-F-1). Regarding concerns over loss of Amtrak service at the existing stations on the BNSF line, OEA notes that the analysis in Appendix 2-F assumes that some Amtrak service would be retained on the existing BNSF route; however, the number of trains that would ultimately shift to the HST tracks, if any, would be a decision made by the operator of the Amtrak passenger service at that time, and not the Authority. Finally, the proposed Kings/Tulare Regional Station East is located roughly three miles east of the existing Hanford Amtrak station in downtown; and therefore, even with potential interim use, Amtrak rail service to and from Hanford would remain reasonably accessible.

## **Freight Railroad Operations**

BNSF cites a number of environmental concerns in its comments on the Final Project EIS including alleged failure of the Final Project EIS to: (1) identify proposed highway-grade separations; (2) identify where the proposed HST would pass over BNSF property; (3) identify precisely where the Authority proposes to relocate BNSF's existing right-of-way; (4) consistently describe the separation between the proposed HST tracks and BNSF's tracks; and

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<sup>16</sup> Until the HST System is ready to accommodate HST service, the Authority refers to potential temporary use of the Fresno to Bakersfield HST Section by Amtrak as "interim use."

(5) explain what would be done to mitigate potential electromagnetic interference (EMI) with BNSF's rail signals and positive train control (PTC) systems.

In its reply to BNSF's comments, however, the Authority notes that many of these issues are addressed in the EIS. For example, proposed highway-grade separations and existing at-grade road/BNSF crossings that would be eliminated are specified in the Final Project EIS (Volume II, Appendix 2-A; Volume III, Sections C and D), as well as in the Draft Project EIS and Supplemental Draft Project EIS. Information on locations where the Fresno to Bakersfield HST Section would pass over BNSF property is provided in the Final Project EIS (Chapter 2, pp. 2-60 through 2-66; Volume II, Appendix 2-B), and proposed relocations of BNSF track are described in the Final Project EIS (Chapter 2, pp. 2-60 through 2-66; Volume III, Sections A and B). Concerning the minimum separation between BNSF's tracks and the HST's tracks, the Authority's reply clarifies that the Authority has "assumed no encroachment on the BNSF right-of-way would occur" (Final Project EIS, p. 2-61). The Authority explains that it fully considered BNSF's protocol to maintain a 30-foot offset between BNSF's property lines and its closest mainline track (Final Project EIS, Figure 2-32). The Authority further notes that the concept of a shared corridor assumes that an appropriate intrusion protection barrier would be provided (Final Project EIS, p. 2-61); and that in any event, the project's design assumes that there would be no encroachment of the HST right-of-way on the BNSF right-of-way.

The Authority's reply also responds to BNSF's concerns about the potential effects of EMI on BNSF's rail signals and PTC. Noting that it is committed to ensuring that the HST system provides safe and dependable service and minimizes impacts to third-party facilities and systems, the Authority states that it would minimize EMI through proper design and system configurations, simulations and calculations that predict the levels of EMI expected to be produced by the HST system, and design "optimization effects on third-party facilities and systems" (Final Project EIS, pp. 3.5-21).

After considering BNSF's comments, the Authority's replies and the Final Project EIS, OEA is satisfied that the Final Project EIS takes a hard look at potential impacts to freight rail operations during project-related construction and operation and that a supplemental EIS on this topic is not necessary. OEA notes that FRA's ROD imposes mitigation that requires the Authority to work with the freight railroads to prevent EMI (FRA ROD, Appendix C, Mitigation Measure EMI/EMF-AM#1). FRA's ROD also imposes mitigation that requires the preparation of a Construction Management Plan to reduce temporary land use impacts during project-related construction (FRA ROD, Appendix C, Mitigation Measures SO-AM#1 and LU-AM#2). Nevertheless, because Mitigation Measures SO-AM#1 and LU-AM#2 do not specifically require the Authority's Construction Management Plan to address construction impacts on freight rail operations, OEA recommends that an additional mitigation measure be imposed by the Board in any decision granting construction authority. That measure would require the Authority to address potential project-related construction impacts on freight rail operation in its Construction Management Plan.

#### **4.2.6 Energy and Energy Conservation**

Commenter Alan Scott notes that the State does not currently have the capacity to power the electrified HST system and that new power plants would be needed to accommodate the needs of the HST system. Other commenters, including Frank Oliveira and Kings County, state that construction constraints posed by an existing PG&E high-voltage transmission line are not adequately recognized in the Final Project EIS.

However, OEA believes that the HST system's contribution to electricity demands in the state and potential impacts on electricity reserves are adequately and reasonably evaluated in the Final Project EIS (p. 3.6-77). As explained there, the HST System would increase peak electricity demand on the State's generation and transmission infrastructure. The Fresno to Bakersfield HST Section and a completed HST System at completion would require approximately 78 and 480 megawatts (MW) of additional peak capacity, respectively. Summer 2010 electricity reserves in the State were estimated to be between 18,472 and 27,708 MW. Therefore, the projected peak demand of the Fresno to Bakersfield HST Section and the entire HST system would not exceed existing reserve amounts (Final Project EIS, p. 3.6-77).

Regarding construction restrictions posed by a PG&E high-voltage transmission line, the Final Project EIS addresses these potential impacts under "Impact PU&E#5 – Conflicts with Existing Utilities" (pp. 3.6-50 through 3.6-54). As explained there, the Authority would negotiate agreements with utilities including PG&E regarding potential conflicts, and would work with utility owners during final engineering design and construction of the project to avoid, relocate or protect utilities, as appropriate. OEA believes that the Final Project EIS takes a hard look at these potential impacts and that supplementing the Final Project EIS to further consider energy and energy conservation is not needed.

#### **4.2.7 Health, Safety, Terrorists Attacks**

Commenters Rochelle Andranigian and Karen Stout question the risks to life and property from the derailment of a high-speed train. Another commenter, Frank Oliveira, states that little information is provided in the project EISs on plans to prevent a truck bomb or IED attack along the HST route. Mercy Hospital notes that a potential increase in the occurrence of valley fever caused by project-related construction has not been adequately mitigated.

In response, OEA notes that the HST System would incorporate design features and operational and maintenance plans to keep trains within the HST System's right-of-way in the unlikely event of a derailment. The design features would include concrete derailment walls, which are tall curb-like structures close to the train's wheels designed to keep the train upright and within the right-of-way. Operational and maintenance plans would also ensure high-quality tracks and vehicle maintenance to reduce the risk of derailment (Final Project EIS, p. 3.11-31). Given the proposed design features and operational and maintenance plans, OEA agrees with the conclusion in the Final Project EIS that the potential for HST derailments would not be significant (Final Project EIS, pp. 3.11-7, 3.11-31 and 3.11-46).

Regarding terrorist attacks, the HST System would include access control and security monitoring systems designed to deter such acts and facilitate early detection. The system features would include sensors on perimeter fencing, closed-circuit television and security lighting, where appropriate. The engineering design and construction phases would also include a threat and vulnerability assessment (Final Project EIS, pp. 3.11-42 and 3.11-43). Accordingly, OEA concurs with the Final Project EIS' conclusion that the probability for terrorist activity in the HST right-of-way would be remote and that appropriate safeguards to minimize terrorism have been taken (Final Project EIS, p. 3.11-47).

Valley fever is a disease endemic to San Joaquin Valley caused by inhaling airborne spores of a soil-dwelling fungus. The commenter's concerns center on fugitive dust caused by project-related construction that could allegedly result in an increase in the number of valley fever cases and a concern that potential impacts have not been appropriately mitigated. However, the project design includes an extensive list of measures that would be implemented by the Authority to minimize fugitive dust emissions during project-related construction (Final Project EIS, pp. 3.3-85 and 3.3-86; FRA ROD, Appendix C, Mitigation Measure AQ-AM#2). Moreover, in response to comments on the Final Project EIS, the Authority and FRA conducted additional consultations with the USEPA and the California Department of Health regarding avoidance and minimization methods for valley fever. These consultations resulted in revised and additional measures being imposed by FRA (FRA ROD, p. 35). OEA is satisfied that the final conditions imposed by FRA are appropriate and reasonable.

#### **4.2.8 Section 6(f) Properties**

The City of Bakersfield asserts in its environmental comments that its Kern River Parkway (Parkway) is a Section 6(f) property under the Land and Water Conservation Fund Act (LWCFA) (16 U.S.C. §§ 4601 – 4601-11).<sup>17</sup> The LWCFA states that no property acquired or developed with the assistance of the LWCFA can be converted to another use other than public outdoor recreation use without the approval of the Secretary of the U.S. Department of Interior (Secretary). The City also asserts that it has not been consulted with on the specific topic of the Parkway as a 6(f) property, that the potential environmental impacts to the 6(f) property need to be evaluated, that the impact findings need to be circulated via the State Clearinghouse, and that the City needs to review and concur with the findings.

The Parkway is a 1,138-acre linear park along the Kern River in the City of Bakersfield. The Parkway consists of small, developed parks containing amenities such as trails, picnic areas and play fields. A bike path also runs the length of the Parkway. The developed parks are separated by undeveloped land owned by the City and private parties. Yokuts Park is a city-

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<sup>17</sup> The City of Bakersfield also submitted comments on recreational facilities that are considered Section 4(f) properties under the Department of Transportation Act of 1966 (49 U.S.C. § 303(c)). However, because the Board is an independent agency and not subject to Section 4(f) requirements, OEA defers to FRA on issues involving Section 4(f). The Final Project EIS (Chapter 4) and FRA's ROD have complete discussions of Section 4(f) properties (FRA ROD, pp. 37 through 40).

owned parcel within the Parkway that was developed with the assistance of LWCFA funds and is the only component of the Parkway eligible for Section 6(f) protection. However, Yokuts Park would not be directly or indirectly affected by the Preferred Alternative (Memorandum from Michael Kay, Regional Consultant, Fresno to Bakersfield HST Section, to Melissa Dumond, FRA, June 30, 2014, p. 14). Accordingly, OEA concludes that there has been no violation of Section 6(f) here and additional environmental analysis is not warranted.

#### **4.2.9 Land Use and Socioeconomics**

Commenter Karen Stout notes that the Preferred Alternative conflicts with King County's and Hanford's land use plans. Other commenters, including William Descary and Ross Browning, state that the project would have devastating economic and social impacts including irreversible damage to homes, churches, schools, businesses and City of Bakersfield facilities including Bakersfield High School and Mercy Hospital.

In OEA's view, these comments fail to show that the Final Project EIS is inadequate or incomplete. The Final Project EIS acknowledges that the Preferred Alternative would conflict with existing Kings County and Hanford land use plans but correctly notes that the proposed project is not required to be consistent with local land use plans and policies (Final Project EIS, pp. 3.13-34 and 3.13-56). The Final Project EIS also thoroughly addresses potential impacts to homes, businesses, schools and other individual land uses (Final Project EIS, pp. 3.12-52 through 3.12-104 and 3.13-35 through 3.13-59), as well as to Mercy Hospital (Final Project EIS, pp. 3.4-31 and 3.4-33). FRA also has imposed an extensive list of design features and mitigation measures to address these impacts (Final Project EIS, pp 3.12-135 through 3.12-141; 3.13-59 and 3.13-61; FRA ROD, Appendix C, Mitigation Measures SO-MM#1 through SO-MM#6, SO-AM#1 and SO-AM#2, and LU-AM#1 and LU-AM#2). NEPA requires no more.

### **5.0 OEA'S FINAL ENVIRONMENTAL RECOMMENDATIONS**

#### **5.1 Final EIS Adoption**

OEA conducted an independent review of the Final Project EIS for the purpose of determining whether the Board could adopt it under 40 C.F.R. § 1506.3. Based on its reviews of the Final Project EIS (including drafts), OEA concludes that (1) OEA's substantive comments and suggestions on the drafts of the Final Project EIS have been satisfied; (2) the Final Project EIS adequately assesses the potential environmental impacts associated with the proposed Fresno to Bakersfield HST Section and meets the standards of CEQ's NEPA regulations and the Board's own environmental regulations at 49 C.F.R. Part 1105; and (3) to satisfy its NEPA obligations, the Board could adopt the Final Project EIS in any decision authorizing the Authority's Petition. Accordingly, OEA recommends that the Board adopt the Final Project EIS (including FRA's Preferred Alternative) in any decision granting the Authority's Petition, and impose the mitigation required by FRA, as well as four additional environmental conditions designed by OEA to further mitigate some potential impacts.

## 5.2 Preferred Alternative

In its ROD, FRA approved the Preferred Alternative, which includes portions of the BNSF Alternative in combination with the Corcoran Bypass, Allensworth Bypass and Bakersfield Hybrid alternatives. The Preferred Alternative also includes two stations: the Kings/Tulare Regional Station-East Alternative and the Bakersfield Station – Hybrid Alternative. OEA concurs with FRA that the Preferred Alternative is the environmentally preferable build alternative.

As the FRA's ROD explains (pp. 24 through 27), the BNSF Alternative through Hanford with the Kings/Tulare Regional Station – East and the Corcoran Bypass were selected because they are more compatible with the long-range development planning for the City of Hanford and the region as a whole than any other combination of alternative alignments, which would result in more options for regional development, and likely allow the HST System to capture a larger regional share of travelers. In addition, the BNSF and Corcoran Bypass alternatives would result in slightly fewer potential impacts on the natural environment than the other alternatives considered in the Final Project EIS, and the community impacts to Hanford and Corcoran are similar to the impacts of the other potential alignment alternatives. The Allensworth Bypass was selected because it would result in fewer impacts to both the natural environment (e.g., wetlands and special-status species habitat) and communities than the BNSF Alternative in the Allensworth area. The BNSF Alternative through Wasco and Shafter was selected because of the similarities of the impacts to natural resources between the BNSF Alternative and the Wasco-Shafter Bypass Alternative in the Wasco/Shafter area and the possibility to address community impacts through mitigation. Consistency with the long-term development plans in Shafter, and cost uncertainties associated with constructing the HST rail line in an existing and rapidly expanding oil field also reasonably factored into the selection. The Bakersfield Hybrid Alternative with the Bakersfield Station-Hybrid station alternative was selected because they would impact the fewest acres of waters of the U.S. when compared with the BNSF Alternative (Bakersfield North) and because they would result in fewer community impacts, including fewer overall displacements and fewer impacts to religious facilities when compared with both the BNSF Alternative (Bakersfield North) and Bakersfield South Alternative (FRA ROD, pp. 24 and 25).

Regarding potential impacts to waters of the United States, the USACE and USEPA concurred that the Preferred Build Alternative is the Least Environmentally Damaging Practicable Alternative; and therefore, would be consistent with the USACE's Clean Water Act, Section 404 permitting program and the USEPA's Section 404(b)(1) Guidelines (40 C.F.R. Part 230) (FRA ROD, p. 26).

Finally, to meet the legislative travel time requirements of express trains between San Francisco and Los Angeles, modeling indicates that the travel time between Fresno and Bakersfield should be no more than 37 minutes. The Preferred Alternative would take 34 minutes and 5 seconds to travel between Fresno and Bakersfield (FRA ROD, p. 25). For all these reasons, FRA reasonably decided on a preferred alternative.

### 5.3 Mitigation

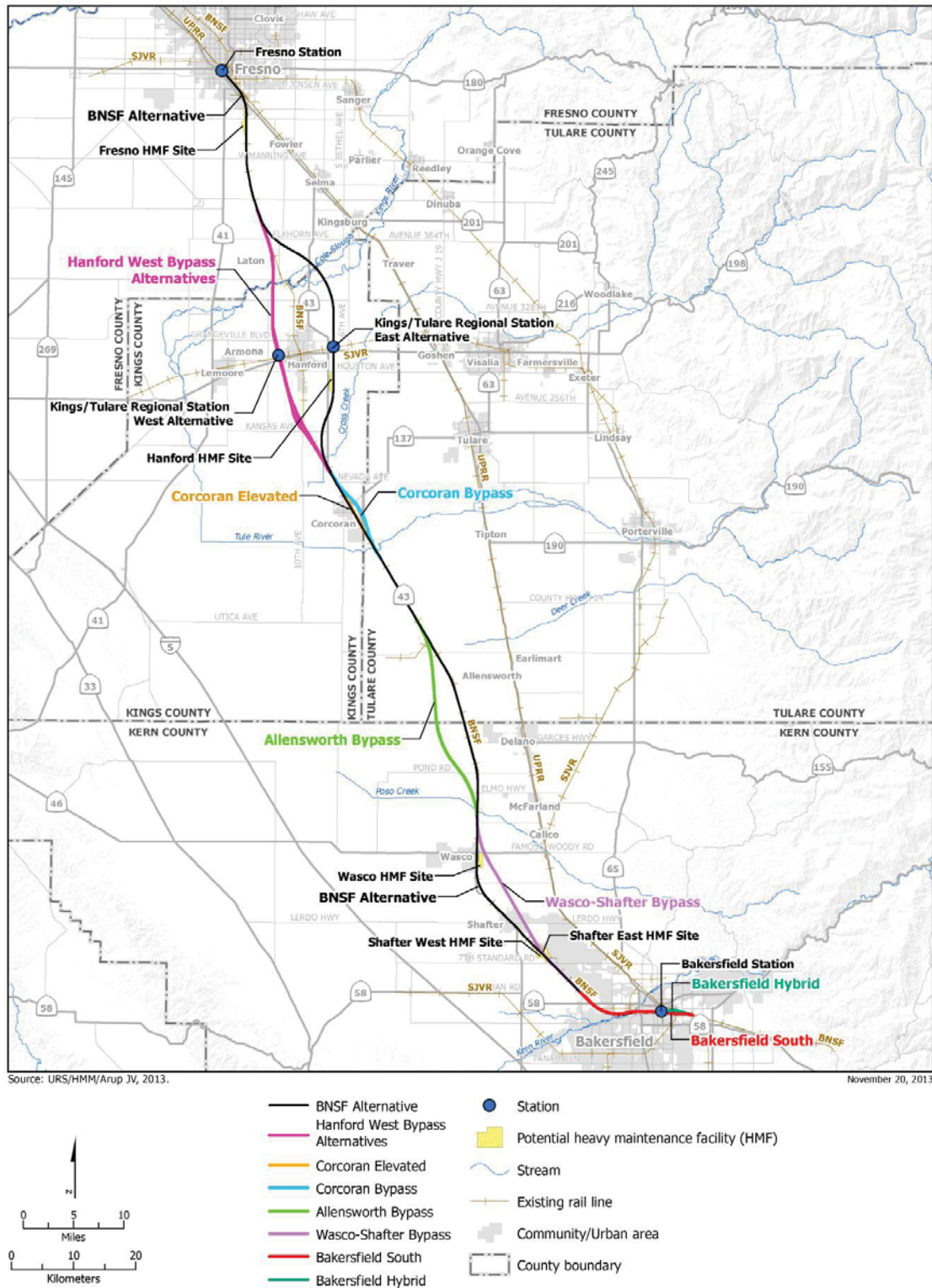
While the Final Project EIS shows that there would be certain unavoidable impacts from the proposed Fresno to Bakersfield HST Section (including road closures, residential and business relocations, noise and vibration impacts and impacts to agriculture lands), FRA adopts an approximately 113-page Mitigation Monitoring and Enforcement Plan (MMEP) in its ROD that specifies means to avoid, minimize or mitigate likely environmental harm caused by the Preferred Alternative, to the extent practicable.<sup>18</sup> FRA developed the measures in consultation with appropriate agencies and input from the public and other interested parties. The MMEP also includes mitigation measures to comply with CEQA. FRA's ROD requires the Authority to comply with all the mitigation measures in the MMEP.

Accordingly, in any decision granting the Authority's construction exemption for the proposed Fresno to Bakersfield HST Section, OEA recommends that the Board adopt the MMEP in its entirety, and impose the following additional conditions for the reasons discussed earlier in this memorandum:

- The California High Speed Rail Authority may construct the alternative, identified as the environmentally preferable alternative by the Federal Railroad Administration (FRA), which consists of portions of the BNSF Alternative, in combination with the Corcoran Bypass, Allensworth Bypass and Bakersfield Hybrid alternatives, the Kings/Tulare Regional Station-East Alternative and the Bakersfield Station – Hybrid Alternative, subject to compliance with all the mitigation measures specified in the Mitigation Monitoring and Enforcement Plan imposed by FRA and provided as Appendix C to FRA's Record of Decision, issued June 27, 2014.
- The California High-Speed Rail Authority shall comply with the Memorandum of Agreement developed through the Section 106 process of the National Historic Preservation Act.
- During project-related construction, the California High-Speed Rail Authority is prohibited from using pile driving within 300 feet of the south side of Mercy Hospital's existing building located at 2215 Truxtun Avenue, Bakersfield, California.
- Prior to initiating project-related construction of the Line, the California High-Speed Rail Authority shall ensure that the Construction Management Plan required by FRA's Mitigation Measures SO-AM#1 and LU-AM#2 construction is expanded to address potential project-related construction impacts to freight railroad operations.

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<sup>18</sup> The MMEP is attached to the ROD as Appendix C, and is available on the FRA's Web site at <http://www.fra.dot.gov/eLib/Details/L05276>.



**Figure 1**  
**Alternatives Carried Forward for Further Study**  
**Fresno to Bakersfield HST Section**  
**STB Docket No. FD 35724 (Sub-No. 1)**